Supreme Court, U.S.
FILED

97 753 OCT 31 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MILWAUKEE BRANCH OF THE NAACP, *et al.*,
Petitioners,

v.

GOVERNOR TOMMY THOMPSON, *et al.*,
Respondents,

and

WISCONSIN ASSOCIATION OF TRIAL JUDGES, *et al.*,
Respondent-Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD SAKS
Perry, Lerner, Quindel & Saks, S.C.
823 N. Cass Street
Milwaukee, WI 53202-3908
(414) 272-7400

DENNIS COURTLAND HAYES
WILLIE ABRAMS
N.A.A.C.P. Special Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215-3297
(410) 358-8900

EDWARD STILL
714 South 29th Street
Birmingham, AL 35233-2810
(205) 324-9966

BARBARA R. ARNWINE
THOMAS J. HENDERSON
TODD A. COX*
Lawyers' Committee for
Civil Rights Under Law
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8321

BRENDA WRIGHT
c/o National Voting Rights
Institute
401 Commonwealth Avenue
Third Floor
Boston, MA 02215
(617) 867-9074
**Counsel of Record*

Counsel for Petitioners

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

12388

QUESTIONS PRESENTED

1. Whether the Seventh Circuit's ruling that white bloc voting was not legally significant conflicts with the congressional purpose behind Section 2 of the Voting Rights Act and this Court's precedents, when black candidates have never prevailed in a contested election without first being appointed to a vacancy by the governor while white judicial candidates attain office through both election and appointment, black voters have not enjoyed persistent proportional representation regardless of whether the results of contested or uncontested elections are included, and black incumbents are challenged and defeated far more often than white incumbents?

2. Whether the Seventh Circuit's ruling, which would exempt at-large judicial elections from the antidilution provisions of Section 2 of the Voting Rights Act so long as the state has a "sincerely held" belief that at-large elections are preferable, conflicts with this Court's ruling in *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991), and with the congressional purpose behind Section 2 of outlawing electoral practices that have a racially discriminatory result, without the necessity of proving invidious purpose?

PARTIES TO THE PROCEEDING

Actual parties to the proceedings in the Court of Appeals were:

Milwaukee Branch of the N.A.A.C.P., Felmers Chaney, Vincent Knox, Barbara White,

Petitioners herein

Governor Tommy Thompson, Senate President Brian D. Rude, Senate Majority Leader Michael G. Ellis, Senator Minority Leader Robert Jauch, Assembly Speaker Walter J. Kunicki, Assembly Majority Leader David M. Travis, Assembly Minority Leader David T. Prosser, Jr.,

Respondents herein

Wisconsin Trial Judges Association, Patrick T. Sheedy, Frederick A. Henderson,

Respondent-Intervenors herein

The Milwaukee Branch of the N.A.A.C.P. is a chartered affiliate of the national N.A.A.C.P., which is incorporated in New York, New York, and headquartered in Baltimore, Maryland, as a not-for-profit entity under I.R.C. 501(c)(3).

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 16

I. THE SEVENTH CIRCUIT'S RULING THAT WHITE BLOC VOTING WAS NOT LEGALLY SIGNIFICANT CONFLICTS WITH THIS COURT'S PRECEDENTS 16

II. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASSOCIATION V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991) 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Abrams v. Johnson, 65 U.S.L.W. 4478 (1997) . 14,20,21

Chisom v. Roemer, 501 U.S. 380 (1990) 23,27

Collins v. Norfolk, Va., 816 F.2d 932 (1987) 23

Cousin v. McWherter, 904 F. Supp.686 (E.D. Tenn. 1995), *appeal docketed sub nom. Cousin v. Sundquist*, No. 96-6028 (6th Cir) 10

Growe v. Emison, 113 S.Ct. 1075 (1993) 16,26

Houston Lawyers' Association v. Attorney Gen. of Texas, 501 U.S. 419 (1991) . . . . i, 21,24,27

Johnson v. DeGrandy, 512 U.S. 997 (1994) 18

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 18

League of United Latin American Citizens v. Clements, 510 U.S. 1071 (1994) 23

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert denied*, 514 U.S. 1083 (1995) 23

Otey v. Common Council of Milwaukee, 281 F. Supp. 264 (1968) 5

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 26

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . 7,10,11, 16,17,18, 19,20,21,22

Trimble v. Gordon, 430 U.S. 762 (1977) 25

Statutes and Regulations

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 1973 1,2

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 . . . . . *passim*

Wis. Stat. Ann. § 801.52 (West 1994) 4

Other Authorities

Senate Report No. 97-417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177 23,26,27

R. Engstrom, D. Taebel, S. Cole, *Cumulative Voting as a Remedy for Minority Voter Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989) 10

Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.C.L. L. REV. 173, 223-236 (1989) 10

E. Still, *Voluntary Constituencies: Modified At-large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE LAW AND POLICY REVIEW 354 (1991) 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners are black citizens and voters in Milwaukee County, Wisconsin. They seek a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's decision rejecting their challenge under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, to the use of an at-large electoral system with numbered posts and a majority-vote requirement to elect all of the 46 circuit court judges of Milwaukee County's First Administrative Judicial District and all of the four court of appeal judges of Milwaukee County's Appellate District I.

OPINIONS BELOW

The July 3, 1997 opinion of the Seventh Circuit is reported as *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997), and is reproduced in Appendix A to this petition. The August 1, 1996 opinion of the United States District Court for the Eastern District of Wisconsin is reported at 935 F. Supp. 1419 (E.D. Wis. 1996), and is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Seventh Circuit was issued on July 3, 1997. Justice Stevens granted an extension to and including October 31, 1997, within which to file the petition for a writ of certiorari. This Court's jurisdiction is invoked pursuant to 28 U.S.C.§ 1254(1).

STATUTES INVOLVED

This case involves the application of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which is reproduced in Appendix C.

STATEMENT OF THE CASE

In Milwaukee County, black citizens constitute 20.2% of the total population and 16.2% of the voting age population. App. at 36b. The 46 circuit court and four appellate court judges are elected countywide in non-partisan elections. App. at 32b-34b. The evidence presented at trial showed that minority electoral success in circuit court and court of appeals elections has been limited. Even though several had run over the last 25 years, no black candidate for the circuit court (or former county court) ever had been successful in their attempts to attain a seat through a contested election without first being appointed to the seat. Pl. Ex. 15 & 16; Def. Ex. 10, Table 3, p. 23; App. at 52b-61b. In contrast, during this same period, some 40 white candidates had successfully stood for election and won a circuit court seat without a prior gubernatorial appointment. *Id.* During that same time, 10.7% of white incumbents, compared to 45.5% of black incumbents, have been challenged when standing for re-election. Pl. Ex. 75. Only 28.6% of challenged white incumbents, but 60% of challenged black incumbents, have been defeated. *Id.* In addition, no black candidate had run for or been appointed to the Court of Appeals. At the time this lawsuit was filed, three of the 46 circuit judges in the First Administrative Judicial District were black. Pl. Ex. 15 and 16. However, before the trial of this case, one of these incumbent black judges was defeated by a white challenger in

a race characterized by a racial appeal. Pl. Ex. 1; Pl. Ex. 17. *See* July 10, 1996 Tr. at 198, 199; July 10, 1996 Tr. at 67-69; July 11, 1996 Tr. at 25. After the trial of this case, another black judge was appointed to a vacancy. App. at 9b.

The election contests were characterized by consistent and severe racially polarized voting, with the majority of black voters choosing the black candidate and the vast majority of white voters supporting the white candidate, resulting in the consistent defeat of the black candidates. Black voters in Milwaukee County are politically cohesive, consistently preferring the black candidate in every contested election featuring a black candidate. Pl. Ex. 1, Table 4; Pl. Ex. 3, Table 1; App at 11b-12b. Since 1972, there has been a total of 10 contested general elections and 7 contested primary elections for the circuit court (or the former county court) in which black candidates competed against white candidates. In every one of the 17 elections, black voters chose the black candidate as their preferred candidate, giving a majority or plurality of their support to the black candidate. In 15 of these 17 elections, at least 68% of black voters united behind the black candidates, ranging up to an estimated 100% support in some elections, based on the results of regression analysis. Pl. Ex. 1, Table 4; Pl. Ex. 3, Table 1; Pl. Ex. 78; July 8, 1996 Trial Transcript ("Tr.") at 72; App. at 10b.

Despite receiving strong support from black voters, black judicial candidates were usually defeated because white voters cast their votes for white candidates. In the 17 primary and general elections where black and white candidates ran for the circuit or county court, white voters only twice gave a majority or near-majority of their vote to the black candidate,

based on the results of regression analysis. In 12 of the 17 elections, white support for the black candidate ranged from 9% to 39%. Pl. Ex. 1, Table 4; Pl. Ex. 3, Table 1 & p. 5; Pl. Ex. 78; July 8, 1996 Tr. at 55. *See also* App. at 14b. Only two black candidates have ever succeeded in winning contested elections for the circuit court, even when running as appointed incumbents. Pl. Ex. 1, Table 4; Pl. Ex. 3, Table 1 & p. 5; Pl. Ex. 78. *See also* App. at 14b.[1] Only one of those candidates, Clarence Parrish in 1981, won a clear majority of the white vote.

Wisconsin law currently permits circuit court judges to serve in any court or branch of a circuit court for such time as the chief justice determines to be necessary, whether or not the judge so assigned was elected by the qualified voters of the court or branch to which he or she is assigned. *See* Pl. Ex. 15 & 16. Moreover, the chief judge of a judicial administrative district may assign an active judge within the district to serve in any circuit court within the district. *Id.* In addition, a circuit court judge may change venue to any county in the interest of justice or for the convenience of the parties or witnesses. Wis. Stat. Ann. § 801.52 (West 1994); *see also* July 11, 1996 at 29-31; July 11, 1996 at 70-71.

The evidence at trial demonstrated historical and continuing racial discrimination against black Milwaukeeans

---

[1] A similar pattern emerges if elections for offices other than circuit court (so-called "exogenous" elections) are examined; black candidates were consistently the preferred candidates of black voters, while white voters generally preferred the white candidates. Pl. Ex. 1, Table 6; Pl. Ex. 2, Table 1; Pl. Ex. 3, Table 3; July 8, 1996 Tr. at 78-80, 83. Pl. Ex. 1, Table 6; Pl. Ex. 2, Table 1; Pl. Ex. 3, Table 3. July 8, 1996 Tr. at 82, 83.

in housing, education, employment and other areas of life, whose legacy has been severe. For example, past court decisions contain extensive findings establishing that black citizens of Milwaukee have faced pervasive racial discrimination in attempting to secure equal housing opportunity. *Otey v. Common Council of Milwaukee*, 281 F. Supp. 264, 269-270, 271 (1968). Milwaukee remains one of the nations most residentially "hypersegregated" cities, Pl. Ex. 4 at 8-10, with blacks still facing discrimination in the rental and sale of housing. Also, blacks are far less likely than whites (all things being equal) to find a bank willing to lend them mortgage money, and have been victims of insurance red-lining. Pl. Ex. 4 at 10-16; July 9, 1996 Tr. at 146-147, 149-161.

In addition, while efforts to desegregate Milwaukee's public schools through the federal courts began in 1965, the public schools did not officially begin the process of desegregating the public schools until 1979, 25 years after *Brown v. Board of Education*. Pl. Ex. 4 at 21. Racial disparities in the public school system persist today in at least three different areas: school segregation levels, scholastic achievement, and student attendance patterns. Pl. Ex. 4 at 21-25; July 9, 1996 Tr. at 140-141.

Milwaukee's African American population is disproportionately poor, with less access to education and employment than other segments of the population. Pl. Ex. 4 at 2-5; July 9, 1996 Tr. at 132-134, 147-148, 162-167; App. at 11b, 23b. While only 10.8% of white people in Milwaukee are poor, 41.9% of blacks are poor. Stip. ¶ 57. Milwaukee has the highest level of ghetto poverty -- the

concentration of people in census tracks with 40% or more people below the poverty line -- of any of the 38 metropolitan areas in the United States with 1 million or more residents. In 1990, 54.8% of black residents lived in ghetto poverty in Milwaukee. When compared to the 89 metropolitan areas with 50,000 or more blacks, only three cites -- Lafayette, Louisiana, Mobile, Alabama, and Shreveport, Louisiana -- rank higher in ghetto poverty. Pl. Ex. 4 at 3-4.

While the unemployment rate for Milwaukee whites is only 4.9%, it is 18.6% for blacks in Milwaukee. Stip. ¶ 61; *see also* Stip., ¶¶ 52-56, 58-60, 62-67. Even during times of economic growth, blacks seeking jobs in Milwaukee faced well-entrenched discriminatory practices in private industry which were reinforced by organized labor. Pl. Ex. 4 at 16; *see also id.* at 19; July 9, 1996 Tr. at 161-162.

The socioeconomic disparities and continuing effects of past discrimination are reflected in the depressed political participation rates of Milwaukee's black voters compared to white voters. Pl. Ex. 1, Tables 5 & 7; July 8, 1996 Tr. at 77, 83, 84; July 9, 1996 Tr. at 167-172; July 10, 1996 Tr. at 206. Black citizens simply have fewer resources with which to support candidates and otherwise participate in politics. *See supra* at 11-12; July 10, 1996 Tr. at 50-51; July 10, 1996 Tr. at 156, 157.

The at-large judicial elections in Milwaukee County are characterized by numbered posts, the lack of a subdistrict residency requirement, a large geographic area in which candidates must run, and a primary system which operates as a majority vote requirement. Pl Ex. 15 & 16; App. at 33b, 34b, 38b. Judicial candidates must run from numbered posts,

called "branches," thus forcing head-to-head contests between white and black candidates and preventing any effort by black voters to use single-shot voting to elect their candidates of choice. Pl. Ex. 15 & 16; App. at 38b. Also, Milwaukee County spans 241 square miles and evidence at trial showed that at-large elections in such a large jurisdiction pose obstacles to minority electoral participation because of the difficulty and expense of campaigning effectively in all areas of the county. July 10, 1996 Tr. at 52-53, 58, 59, and 96; July 11, 1996 Tr. at 206.

The evidence at trial showed that racial appeals were used as recently as a 1996 judicial election. In that election, a white judicial candidate running against a black incumbent with 12 years experience found it advantageous to employ thinly veiled racial appeals in his effort to win election. During that election, the white challenger circulated among voters a flyer that criticized the black incumbent for (1) commenting about police conduct in Milwaukee's black community; (2) attending a rally with black City of Milwaukee Councilmember Michael McGee (a well-known black activist in Milwaukee); and (3) supporting this lawsuit -- what Judge-elect Crawford characterized as "racial gerrymandering and quotas." Pl. Ex. 17. *See* July 10, 1996 Tr. at 198, 199; July 10, 1996 Tr. at 67-69; July 11, 1996 Tr. at 25.

In order to demonstrate that black voters would be able to elect candidates of choice in the absence of the challenged electoral configuration, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 and n. 17 (1986), the plaintiffs presented evidence -- and the District Court found -- that if districts were drawn

for the circuit court using traditional districting criteria, the black population is sufficiently large and geographically compact to form a majority of the voting-age population in a variety of "superdistricts" that would be large enough to elect from five to nine circuit judges. *Id.* Therefore, if a districting plan were used for judicial elections, it would not be necessary to draw single-member districts for each of the 46 circuit court judgeships in order to provide a remedy. Further, the black population is sufficiently large and geographically compact to form a majority in one of four districts for the court of appeals. Pl. Ex. 8. *See also* App. at 8b.

Plaintiffs also presented detailed expert testimony describing a wide variety of potential remedies to cure the Section 2 violation, including some alternatives that would maintain the so-called "linkage" between a judge's jurisdiction and electoral base. Vote dilution could be remedied while maintaining "linkage" by combining a subdistrict election system with an at-large component. For example, one possibility is to hold an initial, nonpartisan election from a subdistrict within the circuit, but to require the winners of the subdistrict elections to submit to a countywide retention election at some point during their six-year terms, perhaps after serving for two or three years. Pl. Ex. 10 at ¶¶ 7-10. Voters would decide by a "yes" or "no" vote whether the incumbent should serve the remainder of his or her term. Judges would remain accountable to the entire electorate, thus eliminating any (alleged) incentive to act as narrow partisans toward the interests of only one segment of the community. If they did so, they would be subject to removal from office by vote of the at-large electorate. At the same time, the use

of subdistricts to determine initial election to the seat would allow minority voters to elect some candidates of choice to office.[2]

A slightly different scheme could provide that judicial candidates run initially in subdistrict elections, but then be approved by a yes or no vote of all the voters in the circuit or county at-large, before taking office. The initial subdistrict election would thus serve as a sort of nomination, with the electorate as a whole having the opportunity to approve or disprove the winner of the subdistrict election. Such a system, by assuring that any judicial candidate must obtain approval by a "yes or no" vote of voters in the entire jurisdiction at-large, would provide another means of preserving the "linkage" between jurisdiction and electoral base. Pl. Ex. 10 at ¶¶ 7-11.[3]

Further, at-large elections could be retained in their entirety, without subdistricts, under cumulative voting or limited voting systems, both of which would prevent the

---

[2] The illustrative subdistrict plans submitted by plaintiffs showed that highly compact majority-black subdistricts could be drawn that could elect anywhere from five to nine circuit judges; there would be no need to subdivide the county into 46 single-member districts for purposes of electing members of the county court. The large populations in these subdistricts would make them similar in size to entire judicial circuits in other parts of the state. For example, the total population of a proposed nine-member majority-black subdistrict would be 180,350. Pl. Ex. 8 at 5.

[3] If a candidate were nominated from a subdistrict, but for some reason failed to win approval in the at-large approval election, the resulting vacancy could continue to be filled in accordance with the current system for filling vacancies by temporary gubernatorial appointment.

dilutive effects of the current at-large scheme. *See Cousin v. McWherter*, 904 F. Supp. 686, 714 (E.D. Tenn. 1995) (noting availability of remedies such as cumulative voting that could be used to preserve at-large elections while remedying the dilutive effects of the current at-large system), *appeal docketed sub nom. Cousin v. Sundquist*, No. 96-6028 (6th Cir.). Such electoral systems, while maintaining at-large elections, amend the rules regarding how votes are cast such that a minority group can effectively elect candidates of its choice. Pl. Ex. 10 at ¶¶ 12-13.[4]

Despite the evidence demonstrating the inability of black voters to elect candidates of choice in the election districts under challenge, the District Court denied the Section 2 claim. The district court found that Milwaukee County's black population was sufficiently large and geographically compact to form a majority in potential subdistricts for the circuit and appellate courts, noting that such districts could be drawn based on traditional redistricting criteria. The evidence thus satisfied the first *Gingles* factor. App. at 8b.

The court also found that Milwaukee's black voters are politically cohesive, satisfying the second *Gingles* factor. The court considered contested judicial elections involving black and white candidates since 1972 and found that "the black

---

[4] *See* R. Engstrom, D. Taebel, S. Cole, *Cumulative Voting as a Remedy for Minority Voter Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.C.L. L. REV. 173, 223-236 (1989). E. Still, *Voluntary Constituencies: Modified At-large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE LAW AND POLICY REVIEW 354 (1991).

candidate was the preferred candidate of black voters" in all of the contested circuit or county court elections it reviewed, based on the expert statistical analysis offered by plaintiffs. App. at 10b-12b.

The district court, however, held that plaintiffs failed to establish the third *Gingles* factor, legally significant white bloc voting. The court determined that white voters gave a majority or near majority of their support to the black candidate in only 2 contested elections since 1972. App. at 14b. The court acknowledged that the degree of bloc voting was comparable to that supporting the finding of a Section 2 violation in *Gingles*. App. at 14b. Nevertheless, based largely upon anecdotal testimony, the court concluded that the divergence in the voting patterns between black and white voters should be attributed to so-called nonracial factors, such as name recognition or a candidate's campaign expenditures. App. at 16b-17b. The district court also relied on the ability of appointed black incumbents to prevail in uncontested elections, while acknowledging that most black incumbents who were actually challenged were defeated. App. at 15b-16b.

The court determined that even if the evidence satisfied all three *Gingles* factors, the district court would deny relief based on the "totality of the circumstances." App. at 17b. Without citing specific evidence, the court found that the state's interest in linking jurisdictional and electoral bases is substantial. App. at 19b, 20b. The court held that Wisconsin should be entitled to maintain its at-large system because "Wisconsin adopted its judicial election agenda about 150 years ago" and, therefore, "surely it was not designed to

minimize the election opportunities of blacks." App. at 20b. The court concluded that the state's interest in linkage could not be outweighed by "marginal evidence of vote dilution." App. at 20b. The court rejected plaintiffs' proposals demonstrating remedial alternatives that would maintain "linkage" while remedying the system's dilutive effect, criticizing these proposals solely because they maintained an at-large component. App. at 20b.

The court also cited what it termed the small pool of eligible minority judicial candidates as explaining the absence of black judges on the bench, although defendants' expert acknowledged that the number of black lawyers does not account for the persistent defeat of those black candidates who do run for judgeships. App. at 21b-22b; July 12, 1996 Tr. At 77. The court also noted the absence of direct official barriers to blacks' voting in Wisconsin and held that the state uses no electoral practices that enhance the opportunity for discrimination, without discussing practices such as Wisconsin's de facto majority-vote requirement and numbered post system. App. at 22b-23b. In addition, while concluding that "the record contains evidence illustrating the existence of a significant disparity in Milwaukee county between blacks and whites in the areas of housing, employment, education and income," the court held that plaintiffs had failed to establish an adequate nexus between these disparities and past discrimination in Milwaukee County or Wisconsin. App. at 23b.

The court found that the 1996 general election between Judge Stamper and Robert Crawford "appears to have involved racial appeals." App. at 24b. The court, however,

ruled that this was not significant because plaintiffs were "able to point to only one judicial election involving a racial appeal." *Id.* The court found that "blacks have enjoyed meaningful electoral success in Milwaukee county and in the state of Wisconsin" based upon a summary of elections for non-judicial offices, many of which consisted of elections from majority-black legislative districts. App. at 24b. Finally, the court found that any claim of unresponsiveness to the interests of black citizens was "speculative." App. at 25b.

On appeal, a panel of the Seventh Circuit affirmed the District Court's ruling against plaintiffs. The Seventh Circuit panel acknowledged that, in the 6 judicial primaries held since 1972, black judicial candidates received only 24% of the votes cast by whites and in none did a black candidate receive more than 50% of the white vote. App. at 4a. The court also recognized that in the 10 contested judicial general elections held since 1972, in which on average black candidates received only 40% of the votes cast by whites, black candidates prevailed only 2 times in 25 years. *Id.* Nevertheless, the court held that it was not clearly erroneous for the district court to conclude that white bloc voting did not result in the consistent defeat of black candidates in Milwaukee County. In reaching this conclusion, the court relied on the ability of black judicial candidates to prevail in primary elections without acknowledging that these same candidates failed to prevail in the general and the ability of appointed black incumbents to prevail in uncontested elections. App. at 4a-5a and 6a-7a. Without citing any evidence or precedents, the panel reasoned that "[o]ne good measure of white voters' willingness to support black candidates is the failure of white candidates to present

themselves for election even when a majority of the electorate is white. Potential opponents concede the election only when they face certain defeat." App. at 7a. The panel considered this evidence "highly informative," stating that "[n]o decision of the Supreme Court suggests otherwise." App. at 8a.

The panel also relied on its perception that black candidates "attracted substantial support from white voters -- greater than the level of support that led the Supreme Court in *Abrams* to hold that a finding adverse to the plaintiffs was not clearly erroneous." App. at 7a. The panel observed that in *Abrams*, the level of white support, which ranged from 22% to 38%, "enabl[ed] black candidates to win a few contests" in Georgia. *Id.* Acknowledging that it was not "very many," the panel determined that, under *Abrams*, "a few is enough to negate the third element of the threshold showing under *Gingles*." *Id.*

The panel's review of the district court's totality of the circumstance analysis focused on only two areas: the pool of available judicial candidates and the state's purported interest in maintaining the existing system. The panel credited the district court's reliance on what it termed the small pool of eligible minority judicial candidates as an explanation for the paucity of black judges on the bench. The panel, however, acknowledged that several arguments supported plaintiffs' position that the state's interest in maintaining the current system is entitled to less weight:

> Much of the law judges use is established by people who live outside of their jurisdiction (state and national legislatures, and the Supreme Court of Wisconsin, make rules local

> judges must employ), diminishing the importance of a link between electoral base and scope of jurisdiction.... Many of the persons affected by judicial decisions are unconnected with the court's geographic base. Litigants may come from anywhere in the world, and none of these strangers has any legitimate interest in whether the judges were elected from the county as a whole or a smaller district.... Wisconsin already has weakened the link between jurisdiction and electoral base. Four appellate judges are elected from Milwaukee County. Although they hear only appeals that originate from the local circuit court, their opinions are binding on the state's other intermediate appellate courts. If the state is content with this situation for the court of appeals, why not for the circuit court? And if the state is content to have four appellate judges elected from one county, why not one appellate judge from each of four districts within the county?.... Other states have severed the link between electoral base and jurisdiction....

App. at 11a.

Nevertheless, without citing any specific evidence, the panel held that none of these reasons were "enough to overcome Wisconsin's interest in electing its trial judges from whole counties." App. at 12a. Like the district court, the Seventh Circuit held that Wisconsin's use of its at-large

system is justified because "Wisconsin created its system of at-large elections about 150 ago" and "the system has not been maintained for discriminatory reasons." App. at 12a. Ultimately, the panel held that Wisconsin's "sincerely held" belief that at-large elections promote impartial judges alone justified the maintenance of the current electoral system. *Id.* The panel addressed neither plaintiffs' proposals demonstrating remedial alternatives that would maintain "linkage" while remedying the system's dilutive effect nor any other factors relevant under the totality of the circumstances analysis.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RULING THAT WHITE BLOC VOTING WAS NOT LEGALLY SIGNIFICANT CONFLICTS WITH THIS COURT'S PRECEDENTS

In *Thornburg v. Gingles*, a majority of the Court defined "racially polarized voting" as "a consistent relationship between [the] race of the voter and the way in which the voter votes . . . or to put it differently, where black voters and white voters vote differently." 478 U.S. at 53 n.21 (internal quotations omitted). As *Gingles* states: "The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit [*Gingles* factor 2] and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate" [*Gingles* factor 3]. 478 U.S. at 56; *see also Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (discussing purpose of second and third *Gingles* factors).

In Milwaukee County, black voters have strongly and cohesively supported black judicial candidates for over 20 years. Nevertheless, no black candidate has ever won a contested election for the circuit court, even though some 40 white candidates have attained seats through contested elections during the relevant time period. Def. Ex. 10, Table 3, p. 23; Pl. Ex. 15 & 16. In the seven primary and 10 general elections where black and white candidates ran for the circuit or former county court since 1972, white voters only twice gave a majority or near-majority of their vote to the black candidate and those instances both involved appointed incumbents seeking re-election. Except for those two instances, both of which occurred more than ten years ago, the black candidates in these elections were all unsuccessful in winning a seat on the court. In 12 of these elections, white support for the black candidate ranged from 9% to 39%. Pl. Ex. 1, Table 4; Pl. Ex. 3, Table 1 & p. 5.

The Seventh Circuit panel nevertheless held that Milwaukee County had not experienced legally significant white bloc voting satisfying the third *Gingles* factor. App. at 6a-7a. The panel's analysis overlooks the clear racial divide in access to the bench under Wisconsin's electoral system, failing to address the discriminatory effect of the at-large judicial election system in Milwaukee County. In Milwaukee, black candidates face uncontested elections only if they are first appointed to a vacancy by the governor and none has ever reached the bench initially through a contested election. By contrast, under the current system, white candidates are able to reach the bench through both election and appointment.

An election system does not provide equal opportunity if white candidates have two routes to the bench -- election and appointment -- but black candidates supported by black voters have only one route -- appointment. The Seventh Circuit never discussed this important racial disparity, instead endorsing a principle which holds that electoral equality is present even when black candidates, but not white candidates, must have the imprimatur of a gubernatorial appointment to attain a seat in contested elections. When black candidates have been entirely excluded from initially reaching the bench through contested elections, this "inexorable zero" is an undeniable bellwether of a racially discriminatory electoral structure. *Cf. Johnson v. Transportation Agency*, 480 U.S. 616, 647 (1987) (O'Connor, J., concurring in the judgment). A reading of Section 2 that ignores such striking racial disparities eviscerates the guarantee of electoral equality that Congress intended to provide under Section 2 of the Voting Rights Act.

The Seventh Circuit also failed to recognize that lack of proportionality is always relevant to the Section 2 inquiry and supportive of a finding of vote dilution in this case. "[I]n evaluating the *Gingles* preconditions and the totality of the circumstances a court must always consider the relationship between the number of majority-minority voting districts and the minority group's share of the population." *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring in the judgment) (citation omitted). Indeed, although it is not alone dispositive "[l]ack of proportionality is probative evidence of vote dilution." *Id. See also*, *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in the judgment) ("the relative lack of minority electoral success

under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution").

In Milwaukee County, which has 46 circuit judges and a black population of 20.2 %, there have never been more than three black judges on the 46-member circuit court, even including the electoral success achieved in uncontested elections. Under a subdistrict plan, black voters could comprise a majority in a subdistrict electing up to nine of the 46 judges on the court. This "relative lack of minority electoral success" under the at-large election plan is highly probative under the Section 2 analysis and supports a finding of vote dilution. *Gingles*, 478 U.S. at 99. Indeed, even if no distinction is made between contested elections, in which black candidates are usually defeated, and uncontested elections, in which, by definition, they are able to prevail, black electoral success in judicial races does not approach the "persistent proportional representation" that could defeat a finding of legally significant white bloc voting under *Gingles*. 478 U.S. at 77.[5]

---

[5] Even in uncontested elections, there is a clear racial differential in the extent to which black and white incumbents are challenged and, when challenged, defeated. Only 10.7% of all white incumbents have been challenged when standing for re-election, but nearly half of all black incumbents -- 45.5% -- have been challenged. Pl. Ex. 75. Moreover, when challenged, black incumbents have faced a far greater likelihood of defeat than white incumbents. Only 28.6% of challenged white incumbents, but 60% of challenged black incumbents, have been defeated. Pl. Ex. 75. Thus, while some black incumbents have enjoyed uncontested elections, even incumbency does not provide as much of an advantage to black judges as to white judges.

Moreover, as this Court recognized in *Gingles*, the ability of a black candidate to prevail in an uncontested election is not generally informative of whether white bloc voting is legally significant. *Gingles*, 478 U.S. at 51 ("the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- *in the absence of special circumstances, such as the minority candidate running unopposed*, . . . -- usually to defeat the minority's preferred candidate") (emphasis added). The Seventh Circuit departed dramatically from this Court's teaching in *Gingles* when it relied almost entirely on black electoral success in uncontested elections to deny relief, particularly when black electoral success even in the uncontested elections has not resulted in proportional representation.

Citing this Court's decision in *Abrams v. Johnson*, 65 U.S.L.W. 4478 (1997), the Seventh Circuit further misapplied this Court's precedents by treating the description of the level of white bloc voting in two Georgia electoral districts in *Abrams* as a nationally applicable cut-off for significant white bloc voting. The panel reasoned that the "[l]evels of white support for black-preferred candidates in Milwaukee County judicial elections exceed the levels in Georgia, and black candidates are more likely to prevail in Milwaukee than in Georgia." *Id.* The court's reasoning conflicts with the long standing principle that the Section 2 analysis is an inquiry into the particular, unique facts of the locale in which the violation arises. *Gingles*, 478 U.S. at 62, 65. The percentage of black voters in Milwaukee County, for example, is lower than the percentage of black voters in the

Abrams districts, which means that a direct comparison of crossover voting rates in these different jurisdictions is simply not meaningful. The court's reasoning, moreover, does not in any way address that, in *Milwaukee*, there is a dual, unequal path to the bench for black and white judges, and black electoral success has been virtually foreclosed except in uncontested elections. Furthermore, the elections analyzed in Georgia were primarily elections in single-member districts, whereas Milwaukee County judicial candidates must run under an entirely at-large scheme. The Seventh Circuit's adoption of an arbitrary numerical cut-off for legally significant white bloc voting, drawn from this Court's brief description of white crossover voting occurring under entirely different circumstances in *Abrams*, denies to minority voters in the Seventh Circuit the "searching and practical evaluation of past and present reality" that this Court has mandated. *Gingles*, 478 U.S. at 62, 65.

II. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASSOCIATION V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991).

In *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991) ("*Houston Lawyers*"), this Court squarely held that the "results" test of Section 2 of the Voting Rights Act applies to claims challenging judicial elections, and that a state's interest in maintaining a particular judicial election scheme does not exempt the scheme from scrutiny to determine if it unlawfully dilutes minority voting strength. 501 U.S. at 428. Under the holding in *Houston Lawyers*,

when states choose to employ popular elections for their trial court judges, those elections are subject to the anti-dilution strictures of Section 2. As this Court stated: "[b]ecause the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution." 501 U.S. at 427. However, in the Seventh Circuit, such discrimination is beyond the reach of Section 2 of the Voting Rights Act if a jurisdiction has a "sincerely held" belief in the legitimacy of the structure of its own judicial election system: "[T]he Voting Rights Act does not compel a state to disregard a belief that larger jurisdictions promote impartial administration of justice, if that belief is sincerely held...." App. at 13a.

In order to assess Wisconsin's sincere belief in the desirability of its current system, the panel merely observed that Wisconsin's judicial election system was 150 years old and was not adopted with the intent to discriminate. App. at 12a. The panel then made its own determination, absent evidence, that "[a]t-large elections from the whole of the judge's geographic jurisdiction are designed to balance accountability and independence." *Id.*

The Seventh Circuit's rule reads an intent standard into Section 2 for judicial election cases. Under this rule, the Seventh Circuit would require minority plaintiffs to challenge a state's sincere belief in the virtue of its own judicial election system rather than prove that the result of the operation of that system dilutes their voting strength, as required under

Gingles. *Gingles*, 478 U.S. at 63-64. By shifting the focus of the inquiry from the effect of the challenged practice to the intent of the state in adopting and maintaining it, the Seventh Circuit's rule directly conflicts with Congress' decision to amend Section 2 to remove any requirement of proving invidious intent in a vote dilution case. *See, e.g.*, Additional Views of Senator Robert Dole, S. Rep. No. 97-417, 97th Cong., 2d Sess. at 195, *reprinted in* U.S.Code Cong. & Admin. News 177, 365 (rejecting suggestion that "defendants be permitted to rebut a showing of discriminatory results by a showing of some nondiscriminatory purpose behind the challenged voting practice of structure"). It also conflicts with this Court's ruling in *Chisom v. Roemer*, 501 U.S. 380 (1990), which applies a results test to the evaluation of vote dilution in judicial election cases. 501 U.S. at 398 ("The results test mandated by the 1982 amendment is applicable to *all* claims arising under § 2") (emphasis added). *See also Collins v. City of Norfolk, Va.*, 816 F.2d 932, 936 (1987) (evidence of causation and intent cannot rebut claim of vote dilution). By creating an intent standard for judicial election cases, the Seventh Circuit's ruling represents an extreme version of the troubling trend in the treatment of judicial election cases by the lower courts under which racially discriminatory at-large judicial election systems have been effectively immunized from challenge under Section 2. *See Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

Indeed, all states which use at-large judicial elections could claim this generalized, sincere belief in the legitimacy

in maintaining "linkage." If that is sufficient to remove a state's judicial elections from the reach of Section 2, then this Court's decision in *Houston Lawyers* would be meaningless: all states that have discriminatory at-large judicial elections would be able to escape Section 2's strictures merely by pointing to their sincerely held belief that such "linkage" is necessary. The panel's ruling cannot be squared with *Houston Lawyers'* holding that state interests are merely "one factor" to be considered under the totality of circumstances, rather than a basis for exempting judicial elections from the coverage of the Voting Rights Act. 501 U.S. at 428.

Furthermore, the state produced no evidence at trial that "linkage" of electoral base and geographic jurisdiction constitutes a strong -- much less a compelling -- state interest in Wisconsin. Incumbent white judges testified as to their personal belief that creation of a subdistrict would be undesirable because judges might feel pressure to favor litigants from their own subdistrict. July 12, 1996 Tr. at 45; July 15, 1996 Tr. at 137-138. But judges called by the state also acknowledged that under Wisconsin's current system judges regularly hear cases in which one litigant but not the other resides in the judge's jurisdiction, and do so fairly and impartially. July 12, 1996 Tr. at 47-48; July 12, 1996 Tr. 82-83. Moreover, the opinion of white and black judges called as witnesses by plaintiffs was that state interests would be advanced, not harmed, by modifying the current election system to alleviate the vote dilution it causes. July 11, 1996 Tr. at 27-31; July 10, 1996 Tr. at 81. Even defendants' witness, Chief Judge Patrick Sheedy, saw no harm to the state resulting from deviations from "linkage" that already exist in practice -- such as the extensive use of reserve judges who are

not elected by the litigants within the judge's jurisdiction. July 12, 1996 Tr. at 47-50. Thus, Wisconsin has no state interest in "linkage" so overwhelming that it overrides contrary federal policy expressed in the Voting Rights Act. *Cf. Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (more is required than "the mere incantation of a proper state purpose" to uphold state action which infringes important rights).

Even if any substantial evidence as to Wisconsin's state interests had been adduced, such interests cannot bar Section 2 liability if the state interest can be accommodated under some remedy that also alleviates the discrimination and thereby vindicates the federal interest behind the Voting Rights Act. The Seventh Circuit's opinion, however, *fails to even mention* the plaintiffs' extensive evidence of alternative remedial schemes that would preserve "linkage" in judicial elections while also alleviating the vote dilution caused by the current system. These remedies include some that would maintain the "linkage" between a judge's electoral base and geographic jurisdiction by combining a subdistrict election system with an at-large component, Pl. Ex. 10 at ¶¶ 7-11, or by retaining at-large elections in their entirety, without subdistricts, under cumulative voting or limited voting schemes. Pl. Ex. 10 at ¶¶ 12-13. The Seventh Circuit, by ignoring the availability of such remedies, clearly has adopted a rule under which asserted state interests play a completely preclusive role barring a Section 2 challenge to judicial elections.

In its considerations, the Seventh Circuit gave no weight to the countervailing strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination

in the election process. Consistent with the Supremacy Clause, Congress has the power to pass legislation that remedies racial discrimination, even when state interests are affected. Using its broad powers under the Fourteenth and Fifteenth Amendments, Congress enacted the Voting Rights Act in 1965 to "rid the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966), and strengthened the Act in 1982 to outlaw election practices that result in racial discrimination, even if the result is unintentional. One of Congress' primary concerns in 1982 was the potential for racial vote dilution through the use of at-large, multimember election districts in which a politically cohesive, geographically compact minority population may find its voting strength submerged, year after year, by white bloc voting.[6]

Thus, it would be contrary to Congress' intent to permit the continuation of a racially discriminatory election system simply because the state can assert an interest and a sincere belief in the legitimacy of the challenged scheme. As the Senate Report accompanying the 1982 amendment of Section 2 stated concerning state interests:

> [e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

---

[6] *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993) ("multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts"); *Thornburg v. Gingles*, 478 U.S. at 47, 48.

S. Rep. No. 97-417, 97th Cong., 2d Sess. at 29 n.117, *reprinted in* U.S.Code Cong. & Admin. News 177, 207.

This court has held that the Voting Rights Act applies when an election system precludes black voters from electing candidates of choice. *Houston Lawyers* instructs that states which choose to elect their judges cannot then claim a state-interest exemption from the requirements of Section 2. The Seventh Circuit's ruling, by concluding that state interests preclude any remedy, contravenes this Court's ruling in *Houston Lawyers* and renders Section 2 inapplicable to elections for state court trial judges.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard Saks
Perry, Lerner, Quindel
& Saks, S.C.
823 N. Cass Street
Milwaukee, WI 53202
(414) 272-7400

Dennis Courtland Hayes
Willie Abrams
N.A.A.C.P. Special
Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 358-8900

Edward Still
714 South 29th Street
Birmingham, AL 35233
(205) 324-9966

Barbara R. Arnwine
Thomas J. Henderson
Todd A. Cox*
Lawyers' Committee for
Civil Rights Under Law
1450 G Street, N.W.,
Suite 400
Washington, D.C. 20005

Brenda Wright
c/o National Voting Rights
Institute
401 Commonwealth Avenue
Boston, MA 02215
(617) 867-9074

*Counsel of Record

Counsel for Petitioners

INDEX

Page

APPENDIX A
Court of Appeals panel opinion, July3, 1997 ..... la

APPENDIX B
District Court Decision and Order, August 1, 1996 ..... lb

APPENDIX C
Statutory Provisions 1c

Appendix A

In The

United States Court of Appeals

For The Seventh Circuit

No. 96-3315

MILWAUKEE BRANCH OF THE N.A.A.C.P. *et al.*,
Plaintiffs-Appellants,

v.

TOMMY THOMPSON, Governor of Wisconsin, *et al.*,
Defendants-Appellees,

and

WISCONSIN ASSOCIATION OF TRIAL JUDGES, *et al.*,
Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 94-C-1245—**Myron L. Gordon**, *Judge*

ARGUED APRIL 14, 1997—DECIDED JULY 3, 1997

Before FLAUM, EASTERBROOK, AND EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Milwaukee County in Wisconsin elects 46 judges to the circuit court, its trial court of general jurisdiction, and 4 judges to the state's court of appeals. Elections are held at large. Each candidate for the circuit court runs for a numbered post, called a branch, though every trial judge has county-wide jurisdiction. When this suit began, 3 of the 46 seats on the circuit court, and none of the 4 on the appellate court, were held by black lawyers. Approximately 20% of the population, 16% of the voting age population, and 3% of the lawyers in Milwaukee County are

black. The percentage of judges who are black is substantially below the first two numbers, but twice the percentage of blacks in the pool of persons eligible for election. (Wisconsin limits judicial office to persons who have been members of the bar for at least five years.)

Plaintiffs, registered voters in Milwaukee County and organizations to which they belong, contend that §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, requires Wisconsin to replace county-wide elections with smaller districts, which could be drawn so that some districts contain majorities of black voters. *Chisom v. Roemer,* 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n v. Attorney General of Texas,* 501 U.S. 419 (1991), hold that §2 of the Voting Rights Act applies to judicial elections, and *Thornburgh v. Gingles,* 478 U.S. 30 (1986), establishes the framework for analyzing multi-member districts under §2:

> Plaintiffs must show three threshold conditions: first, the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51. Once plaintiffs establish these conditions, the court considers whether, "on the totality of circumstances," minorities have been denied all "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Abrams v. Johnson, 64 U.S.L.W. 4478, 4483 (U.S. June 19, 1997) (ellipsis in original). The possibility of increasing minority representation does not compel a jurisdiction to achieve that outcome, unless the three conditions have been met and the judge is satisfied that minority voters have lacked an equal opportunity to participate in the political process. *Johnson v. De Grandy*, 512 U.S. 997 (1994).

After a trial, the district court concluded that plaintiffs did not establish the third threshold condition, because white voters in Milwaukee County have not consistently voted against black judicial candidates. 935 F. Supp. 1419, 1427-30 (E.D. Wis. 1996). Moreover, the court explained, it would not have resolved the case in plaintiffs' favor even if it had found all three conditions satisfied. The court wrote that the state has a substantial interest in electing judges from the same jurisdiction in which they exercise jurisdiction. 935 F. Supp. at 1430-31, citing *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1296-97 (11th Cir. 1995) (en banc) (*SCLC*); see also *Nipper w. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc). Judges do not "represent" voters, and their work affects all litigants and potential litigants, not just their constituents. The district court also thought it significant that, although the pool of persons eligible to be judges is only 3% black, about 6.5% of judges serving in Milwaukee County are black. District Judge Gordon recognized that the Voting Rights Act entitles voters to equal influence and is not (directly) concerned with the interests of persons who seek public office, but the outcome of the process is entitled to weight, see *Baird v. Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) just as a shortfall of black judges compared with the pool of attorneys eligible for election would have been a mark in plaintiffs' favor.

Whenever the outcome depends on an assessment of the totality of the circumstances, appellate review is deferential. Abrams holds this for §2 in particular. A totality-of-circumstances approach means that there is no entitlement to a particular outcome if one proves specific facts. There are only shadings and nuance, which different people estimate differently. Litigants are entitled to an honest application of the legal framework, not to a particular result. Inevitable differences in balancing incommensurables do not justify appellate substitution of judgment; when assessments differ, the trial court's prevails because there is no rule of law by which its decision may be called "wrong." One could say that three judges' gestalts are better than one, because less likely

to be idiosyncratic, but this observation has not carried the day with the Supreme Court. *E.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990). Appellate judges' reactions are less likely to be informed by an accurate appreciation of the picture painted by the evidence at trial, and having three judges duplicate the work of one, when it is not possible to identify right answers with any confidence, is an imprudent investment. So we must accept the district court's characterization unless it is clearly erroneous. That the judge considered legal questions on the way to resolving the ultimate issue does not authorize the court of appeals to depart from the usual deferential approach. *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982). If a legal error influences a finding, we may if necessary remand the case for a new trial, but we do not think that any of the judge's conclusions can be attributed to a mistake of law. To the contrary, the district judge followed the sinuous path of §2 law with great care.

Take for example the finding that white voters in Milwaukee County do not vote so cohesively that they regularly defeat the candidates preferred by black voters. Between 1972 and the trial, 16 judicial contests (6 primaries and 10 general elections) pitted black against white candidates; in another 6 campaigns black candidates ran unopposed. In the 6 contested primaries, the black candidates received about 24% of the votes cast by white voters. All of the primaries had at least 3 candidates; in none did any candidate receive more than 50% of the votes cast by whites. Black candidates advanced to the general election in 5 of these 6 primaries. (Wisconsin uses a "nonpartisan" system of elections to the judiciary, so the top 2 candidates in the primary advance to the general election. If only 2 candidates enter the contest there is no primary.) In the 10 contested general elections, the black candidates received on average 40% of the votes cast by whites. In 2 of the 10 elections, the black candidates prevailed. Of course, the black candidate prevailed all 6 times in uncontested elections, and the district court inferred from the lack of contest that white voters would

have been willing to support these candidates; otherwise a white candidate could have entered and won. Since 1980 black judges running for reelection have been opposed only 3 times, and they have prevailed in 2 of these races. Meanwhile 4 white judges lost or withdrew from races for reelection. These results, the district judge wrote, show not only substantial willingness among white voters to support black candidates, but also the ability of these candidates to gain and keep office. Bloc voting among white voters does not "consistently defeat minority candidates", *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring) and therefore does not establish the third of the necessary conditions, the judge concluded.

Plaintiffs might have replied by challenging the understanding that the third component of the threshold showing requires proof that white bloc voting "consistently" defeats black candidates. Justice O'Connor's concurring opinion in *Gingles* is not entirely harmonious with Justice Brennan's plurality opinion on this score, and later cases have not directed sustained attention to the issue. But plaintiffs do not contest the district court's reliance on Justice O'Connor 's view. Nor do they contend that, when black voters are as small a minority as they are in Milwaukee County, the fact that black candidates receive significant support from white voters says more about the candidates than about the voters. Drawing inferences from voting patterns is hazardous, because a *combination* of voters and candidates decides elections and candidates' choices may mask the inclinations of the electorate. Suppose most white voters in Milwaukee are strongly disciplined to vote for a black candidate for judge. Unless black attorneys want to tilt at windmills, they would not run for judicial office. Those who do would have some quality unusually favorable public prominence, copious financing, demonstrated accomplishments that ensure endorsements from newspapers and bar associations that helps them overcome the white electorate's 'druthers. Outside observers would see substantial white support for these black

candidates, but this would be deceiving; in races between equally qualified (equally well known, etc.) white and black candidates, the whites would win every time. Strategic decisions by would-be candidates make inferences based on results at the polls unreliable; reluctance of white voters to support black candidates then would be manifest in the scarcity of black candidates, not in the distribution of the votes when blacks do run.

There are countervailing effects. Suppose the income of black lawyers in Milwaukee County is less than that of white lawyers. This would make low-paying jobs in the public sector more attractive to black attorneys and because their opportunity costs of seeking office (the income foregone during the campaign) would be lower, black attorneys would be willing to run despite a low chance of success at the polls. A lower success rate for black candidates then would reflect their economic circumstances rather than anything about the electorate.

Candidates' decisions could make evidence of bloc voting in the black electorate similarly unedifying. One strategy would be to run a campaign designed to attract 90% support from black voters and 40% support from white voters; the success of such a campaign would be more a tribute to the candidate than a prediction about how voters would behave if randomly selected candidates appeared. Yet the statistical models used by both sides in this litigation, and in similar suits under the Voting Rights Act, *suppose* that candidates appear randomly, and that the only difference among candidates is race. That premise is untrue, devaluing the inferences from the statistical analysis. Maybe it would be more useful to define racial polarization of the electorate as evidence that white support for a candidate falls as black support for the candidate rises. But, as we say, the plaintiffs make nothing of the problems in the statistics for Milwaukee County.

Taking the figures at face value, as the parties do, leads straight to the conclusion that the district court's findings are

not clearly erroneous. During the last 25 years, black candidates have prevailed in 6 uncontested races, qualified for the general election in 5 of 6 contested primaries, and won 2 of 10 contested general elections. Black candidates did not lose "consistently." Plaintiffs observe that both of the black candidates who prevailed in contested general elections had been appointed to the bench by the Governor and enjoyed the advantage of incumbency, but the fact remains that these judges' color did not lead the voters to turn them out. Black candidates, whether or not incumbent, attracted substantial support from white voters greater than the level of support that led the Supreme Court in *Abrams* to hold that a finding adverse to the plaintiffs was not clearly erroneous. White support for black candidates in Georgia (the state involved in *Abrams*) ranged from a low of 22% to a high of 38%, depending on the office, see (64 U.S.L.W. at 4483, enabling black candidates to win a few contests. Not very many, as Justice Breyer's dissent in *Abrams* points out, 64 U.S.L.W. at 4491-93, but the majority concluded that a few is enough to negate the third element of the threshold showing under *Gingles*. Levels of white support for black-preferred candidates in Milwaukee County judicial elections exceed the levels in Georgia, and black candidates are more likely to prevail in Milwaukee than in Georgia.

Notwithstanding all of this, plaintiffs (with the support of the United States as *amicus curiae*) insist that two legal errors by the district court vitiate its findings. They contend first that the district court should have ignored the uncontested elections, and second that the court should not have investigated potential non-racial reasons why black candidates lost in contested elections. On the first of these issues, the district court was on solid ground and for the reason it gave. One good measure of white voters' willingness to support black candidates is the failure of white candidates to present themselves for election even when a majority of the electorate is white. Potential opponents concede the election only when they face certain defeat. That 6 black candidates ran without

opposition therefore is highly informative. No decision of the Supreme Court suggests otherwise.

As for the second issue: we agree with plaintiffs to the extent they observe that some of the reasons the district judge considered are not necessarily independent of race, but this does not undercut the court's ultimate conclusion. The district judge analyzed 4 of the 8 general elections in which black candidates were defeated, concluding that in each of these 4 the white candidate enjoyed a big advantage better name recognition, success in raising funds, ability to accuse his opponent of domestic abuse, and so on seemingly unrelated to race. 935 F. Supp. at 1429. What turns out to be related to race is not easy to know, however. Maybe the victorious candidates were able to amass a larger war chest precisely because donors expected them to prevail, given the electorate's preference for white candidates. Name recognition, too, may be a proxy for antecedent preferences of the voters. A district judge therefore should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost, if white voters disapproved these candidates en masse. Proving discriminatory intent is not part of the plaintiffs' case under §2. *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994); *Baird*, 976 F.2d at 359-60.

It does not follow that the circumstances of individual elections must be banished from the analysis. They matter to the totality-of-circumstances inquiry even if not to the threshold case, and in principle they are relevant to the threshold case as well. Suppose black candidates prevailed in 2 of 10 contested general elections, and the only victories could be attributed to shortcomings of the white candidate rather than to the electorate holding the black candidates in high esteem. Perhaps one white candidate was brought down by revelations of ethical improprieties, and the other was deemed incompetent by all the bar associations and newspapers in the county. A judge then might properly

conclude that white bloc voting has consistently defeated the black voters' preferred candidates in genuinely contested races, even though the candidates preferred by the black electorate won some races. And if analysis of this kind can in principle cut in favor of plaintiffs, it can cut in favor of defendants. As a rule, however, it would be best for district judges to postpone this kind of inquiry to their consideration of the totality of the circumstances, the second part of the *Gingles* inquiry. Yet although the district court did not discuss the potential link between race and funding levels (for example), neither did the judge assign to plaintiffs the burden of showing causation. Victories in other elections of candidates preferred by black voters, coupled with white voters' significant support for black candidates, relegates this part of the district court's analysis to the periphery.

Having concluded that the district judge did not commit clear error in finding that defendants prevail on the third element of the *Gingles* threshold showing, we could stop and affirm the judgment. But the possibility that plaintiffs will seek review in a higher tribunal, coupled with the recurring nature of the questions, leads us to address plaintiffs' contention that the district court erred in analyzing the totality of the circumstances. Plaintiffs, supported by the United States, contend that the district judge erred in giving any weight to defendants' contention that judges should be elected from districts coterminous with the court's geographic jurisdiction. They also submit that the judge erred in believing that the ability of black attorneys to gain judicial office out of proportion to the number of black attorneys in the county is legally significant.

The second of these arguments essentially asks us to overrule *Baird*, which held that a judge may consider the race of victorious candidates, as well as the voting patterns of the electorate, when conducting the second stage of the *Gingles* inquiry. See also *Johnson v. De Grandy*, 512 U.S. at 1012 n.10. *Gingles* did not yield a majority opinion. We concluded in *Baird* that Justice White's separate opinion in *Gingles* had

the support of five Justices, to the extent Justice White believed that courts may take account of prevailing candidates' race. Section 2(b) affords strong support: "The extent to which members of a protected class have been elected to the office in the State or political subdivision is one circumstance which may be considered." 42 U.S.C. §1973(b). A case such as ours shows why this consideration helps. If this were a Title VII case, and the defendant were an employer, then the fact that the work force at the employer had twice as many blacks as would have been produced by random draws from the applicant pool would be a powerful, though not dispositive, see *Connecticut v. Teal,* 457 U.S. 440 (1982), argument against a claim that the employer discriminated against blacks just as the failure of the employer to hire blacks in proportion to the applicant population would be a telling arrow in the plaintiffs' quiver. Milwaukee County hires judges, just as a large law firm hires lawyers. That hiring decisions are made by voting does not disable a court from using statistics to conclude that these hiring decisions are not discriminatory and if the outcome does not discriminate against black attorneys (who, plaintiffs insist, are the candidates preferred by black voters), this is the basis for a rational inference that the rules for conducting elections (including the drawing of district lines) do not provide minority voters "less opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973(b). Plaintiffs want to use "input" statistics (whom black and white voters support) to build their case; defendants are entitled to use "output" statistics to undermine the inferences plaintiffs propose.

Let us return, then, to the question whether the court may give weight to a state's asserted interest in matching the boundaries of a court's jurisdiction to the boundaries of the judges' electoral base. *Houston Lawyers' Ass'n,* 501 U.S. at 427, tells us that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices . . . does not automatically, and in every case, outweigh proof of racial vote dilution." Judge Gordon

did not treat this interest as "automatically" outweighing proof of vote dilution; he said no more than that the interest is weighty. In asking us to hold that this was error, plaintiffs really want us to say that the only proper weight is zero (or, if not nil, so low that it can never tip the balance). Such a conclusion would put us in conflict with en banc decisions of the fifth and eleventh circuits, which hold that this consideration is powerful, indeed dispositive unless the plaintiffs show gross racial vote dilution. *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 (5th Cir. 1993) (en banc) (*LULAC*); *SCLC*, 56 F.2d at 1294-95; *Nipper*, 39 F.3d at 1543; accord, *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995).

What can be said in favor of plaintiffs' position is this: (i) Judges do not "represent" the people who elect them, so a match of electoral base to geographic jurisdiction is less important for judicial than for legislative office. (ii) Much of the law judges use is established by people who live outside their jurisdiction (state and national legislatures, and the Supreme Court of Wisconsin, make rules local judges must employ), diminishing the importance of a link between electoral base and scope of jurisdiction. (iii) Many of the persons affected by judicial decisions are unconnected with the court's geographic base. Litigants may come from anywhere in the world, and none of these strangers has any legitimate interest in whether the judges were elected from the county as a whole or a smaller district. (iv) Wisconsin already has weakened the link between jurisdiction and electoral base. Four appellate judges are elected from Milwaukee County. Although they hear only appeals that originate from the local circuit court, their opinions are binding on the state's other intermediate appellate courts. If the state is content with this situation for the court of appeals, why not for the circuit court? And if the state is content to have four appellate judges elected from one county, why not one appellate judge from each of four districts within the county? (v) Other states have severed the link between electoral base and jurisdiction. In Cook County, Illinois, many judges of the court of first

instance are elected from very small districts, although they exercise authority in the county as a whole. If Illinois finds this satisfactory, why does Wisconsin have a substantial interest in doing things otherwise, one may ask.

Each of these points has some force, but individually and collectively they are not enough to overcome Wisconsin's interest in electing its trial judges from whole counties. Wisconsin created its system of at-large elections about 150 years ago, long before it had a substantial minority population, and the district court found (when rejecting a claim under the fifteenth amendment) that the system has not been maintained for discriminatory reasons. 929 F. Supp. 1150, 1159 (E.D. Wis. 1996). It is a vestige of the Jacksonian era decision to elect judges. At-large elections from the whole of the judge's geographic jurisdiction are designed to balance accountability and independence. In a federal system, states are entitled to do things differently; Illinois' willingness to use subdistricts no more obliges Wisconsin to do so than the other way around. Not everyone in Illinois is enamored of its system, which by limiting election to attorneys who live in the subdistricts disqualifies many of the best candidates for these posts. The fifth circuit concluded that 25 of the 29 states that elect judges do things Wisconsin's way. ***LULAC***, 999 F.2d at 872 & n.33. Although judges in Milwaukee County draw much of the law they enforce from sources outside the county, and resolve disputes among people who live beyond its borders, they also make or influence much of the law they administer, and apply much of it to locals. Interstitial lawmaking is part of a common law system. See *Gregory v. Ashcroft*, 501 U.S. 452, 465-67 (1991). And judges exercise much discretion even when they do not make-law. Choice of electoral districts may influence that discretion, for better or for worse.

Wisconsin believes that election of judges from subdistricts would lead to a public perception (and perhaps the actuality) that judges serve the interests of constituencies defined by race or other socioeconomic conditions, rather than the interest of the whole populace. Larger jurisdictions liberate judges, to some

degree, from the pressure created by the need to stand for reelection. A judge elected from a small district might fear that acquittal of a person charged with a crime against a member of that neighborhood, or a decision that harms an employer in that neighborhood, will lead to defeat at the polls. To free the judge to follow the law dispassionately, Wisconsin prefers to elect judges from larger areas, diluting the reaction to individual decisions. Perhaps the belief that judges favor those who elect them is unwarranted though the diversity jurisdiction of the federal courts rests in part on a belief that state judges highly value the interests of that state's citizens and thus are potentially biased against citizens of other states. See Henry J. Friendly, *Federal Jurisdiction: A General View* 146-50 (1973). So too, perhaps, for smaller jurisdictions within a state. It is odd to find the United States, whose judges have secure tenure, arguing in this case that Wisconsin must treat its judiciary like ward heelers. At all events, the Voting Rights Act does not compel a state to disregard a belief that larger jurisdictions promote impartial administration of justice, if that belief is sincerely held—as the district judge concluded that it is in Wisconsin.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 94-C-1245

MILWAUKEE BRANCH OF THE N.A.A.C.P.; FELMERS CHANEY; VINCENT KNOX and BARBARA WHITE,
Plaintiffs,

RAMON ARELLANO VALDEZ and THE FEDERATION FOR CIVIC ACTION, INC.,
Plaintiffs-Intervenors,

v.

GOVERNOR TOMMY THOMPSON; SENATE PRESIDENT BRIAN D. RUDE; SENATE MAJORITY LEADER MICHAEL G. ELLIS; SENATE MINORITY LEADER ROBERT JAUCH; ASSEMBLY SPEAKER WALTER J. KUNICKI; ASSEMBLY MAJORITY LEADER DAVID M. TRAVIS; ASSEMBLY MINORITY LEADER DAVID T. PROSSER, JR.; MILWAUKEE COUNTY BOARD OF ELECTION COMMISSIONERS; COMMISSIONER MOLLY KORANDA; COMMISSIONER; WEBSTER HARRIS, JR.; COMMISSIONER TILLIE BICHANICH; CITY OF MILWAUKEE BOARD OF ELECTIONS COMMISSIONERS; COMMISSIONER ROSEMARIE MCDOWELL; AND COMMISSIONER JEAN NOVSHEK,
Defendants,

WISCONSIN ASSOCIATION OF TRIAL JUDGES; PATRICK T. SHEEDY and FREDERICK A. HENDERSON,
Defendants-Intervenors.

DECISION AND ORDER

On November 10, 1994, the plaintiffs filed this action seeking declaratory and injunctive relief. The plaintiffs asserted claims under § 2 of the Voting Rights Act of 1965, ["VRA"], as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution regarding the statutory provisions of the state of Wisconsin and the procedures followed for the election of state judges in Milwaukee county. In their complaint, the plaintiffs alleged that the current at-large method for electing state circuit and appellate judges in Milwaukee county violates the VRA and the Fourteenth and Fifteenth Amendments with respect to black voters within the county. The plaintiffs charge that the current at-large judicial electoral technique impermissibly dilutes the voting strength of black voters in Milwaukee county.

On December 2, 1994, the plaintiffs-intervenors filed a motion to intervene, along with a proposed complaint in intervention, asserting claims on behalf of Hispanic voters which are almost identical to those made by the original plaintiffs. In their complaint, the plaintiffs-intervenors asserted that the current at-large scheme of elections for the state circuit court violates the VRA and the Fourteenth and Fifteenth Amendments with respect to Hispanic voters within Milwaukee county. However, the plaintiffs-intervenors do not challenge the system for electing judges to the state court of appeals in Milwaukee county.

On January 27, 1995, Judge John W. Reynolds granted the plaintiffs-intervenors' motion to intervene in this action, and, on April 26, 1995, he granted the defendants-intervenors motion to intervene. An order was entered by Judge Reynolds on April 6, 1995, which bifurcated the trial into a liability stage and a remedy stage.

By decision and order of June 10, 1996, I granted the motion made by the defendants and defendants-intervenors for partial summary judgment as to the constitutional claims advanced by the plaintiffs and plaintiffs-intervenors. In the same ruling, I denied the motion made by both sets of

defendants for partial summary judgment as to the plaintiffs-intervenors' claim under § 2 of the VRA.

A trial to the court was conducted on the issue of liability under § 2 of the VRA from July 8, 1996, through July 16, 1996. Pursuant to the stipulation of the parties, which was approved by the court on July 8, 1996, the claims of the plaintiffs-intervenors were not at issue in this trial. This opinion constitutes the court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

The parties filed a comprehensive stipulation on July 8, 1996, setting forth 70 factual findings which the court may recognize under Rule 52, Federal Rules of Civil Procedure. In addition, on July 16, 1996, the parties filed an addendum to the stipulation which identifies one more factual finding. The stipulation and addendum to the stipulation are attached to this decision and order as appendix A. Factual findings made by the court which are not specifically identified in the stipulation or addendum to the stipulation are set forth in the body of this decision and order.

I. SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the VRA, as amended, prohibits states from imposing or applying any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of this provision is established where

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision

> is one circumstance which may be considered: ***Provided***, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (emphasis in original).

At-large elections are not a per se violation of the VRA. ***Thornburg v. Gingles***, 478 U.S. 30, 48 (1986). Minority voters asserting a claim under the VRA must prove that the electoral structure "operates to minimize or cancel out their ability to elect their preferred candidates." ***Id.***

To prevail on a challenge to an at-large system on behalf of a protected class of citizens, plaintiffs must meet the threshold requirements that the United States Supreme Court first identified in ***Gingles***. Specifically, plaintiffs in vote dilution cases such as the one at hand must demonstrate that: (1) the group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. ***Id.*** at 50-51.

Proof of these three ***Gingles*** prerequisites creates an inference that members of the minority are harmed by the challenged electoral structure. ***Uno v. Holyoke***, 72 F.2d 973, 980 (lst Cir. 1995). However, "that inference is rebuttable." ***Id.***; ***Westwego Citizens for Better Government v. City of Westwego***, 946 F.2d 1109, 1116 (5th Cir. 1991). The plaintiffs must show that, "under the totality of the circumstances," they do not possess the same opportunities to participate in the political process and to elect representatives of their choice enjoyed by other voters. ***League of United Latin Amer. Citizens v. Clements***, 999 F.2d 831, 849 (5th Cir. 1993) ***cert. denied***, 510 U.S. 1071 (1994) ["LULAC"].

In making this inquiry, courts are directed to analyze the factors first enunciated in ***Zimmer v. McKeithen***, 485 F.2d 1297 (5th Cir. 1973), ***aff'd sub nom East Carroll Parish School Bd. v. Marshall***, 424 U.S. 636 (1976), and later identified in the Senate Report accompanying the 1982

amendments to §2 of the VRA. The non exclusive list of factors to be addressed in a totality of the circumstances assessment include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched upon the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. 417 at 28-29, ***reprinted in*** 1982 U.S. Code Cong. & Admin. News at 206-07.

The Supreme Court has held that § 2 of the VRA applies to state judicial elections. ***Chisom v. Roemer***, 501 U.S. 380 (1991); ***Houston Lawyers ' Ass 'n v. Attorney General of Texas***, 501 U.S. 419 (1991). However, the Supreme Court left open the issue of what a plaintiff would have to establish to obtain relief in vote dilution claims in the context of judicial elections. To date, the court of appeals for the seventh circuit has not had occasion to apply § 2 of the VRA to judicial elections. A number of other courts have done so, and those cases are instructive in determining how, if at all, the ***Gingles*** and "totality of the circumstances" analyses differ in the context of judicial elections.

II. GINGLES PRECONDITIONS

A. Geographical Compactness

Under the first ***Gingles*** factor, the plaintiffs must show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. 478 U.S. at 50. In order to satisfy this standard, the plaintiffs must prove that there is a "solid and substantial" potential to elect a minority-preferred candidate in a single-member district. ***McNeil v. Springfield Park District***, 851 F.2d 937, 944 (7th Cir. 1988), ***cert. denied***, 490 U.S. 1031 (1989). Thus, a minority group comprising less than a majority in a district would not necessarily have the potential to elect their candidates of choice. ***Id.*** The court of appeals for the seventh circuit has also made clear that a court must look only at minorities of voting age in determining whether a minority group is sufficiently large to constitute a majority in a single-member district because those ineligible to vote have not experienced a dilution of their vote." ***Id.*** at 945.

"The first ***Gingles*** precondition . . . dictates that the issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases." ***Nipper v. Smith***, 39 F.3d 1494, 1530-31 (11th Cir. 1994), ***cert. denied,*** _ U.S. _, 115 S. Ct. 1795 (1995). A district court is obligated to determine as part of the ***Gingles*** threshold inquiry whether it can fashion a

permissible remedy in the particular context of the challenged system. ***Id.*** at 1531.

Two recent decisions of the Supreme Court provide guidance in assessing whether a plaintiff's proposed remedy is permissible. In ***Bush v. Vera***, 64 U.S.L.W. 4452 (U.S. June 13, 1996), and ***Shaw v. Hunt***, 64 U.S.L.W. 4437 (U.S. June 13, 1996), the Supreme Court struck down redistricting plans adopted pursuant to § 5 of the VRA from Texas and North Carolina, respectively. Each of these redistricting plans involved bizarrely shaped majority-minority districts.

The Supreme Court held that these redistricting plans were unconstitutional under the Fourteenth Amendment because they departed dramatically from traditional redistricting principles such as geographic compactness and therefore, were not narrowly tailored to further a compelling governmental interest. In so holding, the Supreme Court rejected the contention that the redistricting plans were justified under § 2 of the VRA. The Court concluded that § 2 does not require a state to create, on predominantly racial lines, a district that is not "reasonably compact." ***Bush***, 64 U.S.L.W. at 4460.

In my opinion, these two cases support the proposition that a proposed remedy under § 2 which departs from traditional redistricting principles solely because of a desire to create a majority black district is unconstitutional. Such a remedy would also be impermissible under the ***Gingles*** standard.

The defendants and defendants-intervenors acknowledge that a single-member district in which blacks would constitute a voting majority can be created for the state circuit court. However, they contend that the plaintiffs have failed to demonstrate that such a district can be created with respect to the state court of appeals.

As to the Wisconsin court of appeals, the plaintiffs propose that District I, which consists of Milwaukee county alone, be divided into four subdistricts with approximately equal population (roughly, 239,819). (Reports of Ian Millet, ¶s' Exs. 8 and 9.) According to these two proposals, the black

population in one of the four districts would form a majority of 62.5% or 63.7% black voting age population.

The defendants and defendants-intervenors contend that this remedy is inadequate because it would result in fewer voters per judge in District I than in the balance of the state. However, that is the case under the present system. Currently, the areas of the state outside Milwaukee county elect one judge for every 327,708 residents whereas Milwaukee county residents elect one court of appeals judge for every 239,819 residents. The plaintiffs' proposal does not significantly deviate from this current practice as the proposed subdistricts have populations of 237,133 (District 1), 241,915 (District 2), 240,504 (District 3), and 239,719 (District 4). (¶s' Ex. 8, p. 4.) The additional assertion of the defendants and defendants-intervenors that sub-districting District I would require that all of the state's current sixteen court of appeals judges be elected from single-member districts with equal populations is unsubstantiated. Moreover, a review of the single-member districts proposed by the plaintiffs reveals that they are regularly shaped and geographically compact in compliance with traditional redistricting principles.

I find that the plaintiffs have demonstrated that under a single-member district scheme, Milwaukee county's black citizens would possess the potential to elect a state circuit court judge and a state court of appeals judge of their choice. Accordingly, the first ***Gingles*** test has been satisfied by the plaintiffs.

B. Black Political Cohesion

The second ***Gingles*** precondition requires the plaintiffs to establish that the black voters in Milwaukee county are politically cohesive. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, . . . and consequently, establishes minority bloc voting within the context of § 2." ***Gingles***, 478 U.S. at 56.

This requirement is necessary because unless the minority group is politically cohesive, "it cannot be said that

the selection of a [particular] electoral structure thwarts distinctive minority group interests." ***Id.*** at 51. The ***Gingles*** plurality opinion recognized that the race of the candidate is, in general, of less significance than the race of the voter when determining the existence of racial polarization. ***Id.*** at 67. The courts of appeals for the fifth and eleventh circuits have concluded that the evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates. ***Nipper***, 39 F.3d at 1540; ***LULAC***, 999 F.2d at 864; ***Westwego***, 872 F.2d at 1208 n.7.

Before applying the applicable law to the facts in this case, it should be noted that out of 46 circuit court judgeships in Milwaukee county the number of black judges currently on the circuit court bench is three: Russell Stamper, Maxine White and Stanley Miller. Judge Stamper was defeated by a white opponent in the general election of March 19, 1996, and will leave office on January 1, 1997. However, the recent appointment of a black circuit judge for Milwaukee county, M. Joseph Donald, will restore the statistical count to three. None of the four court of appeals judges in Appellate District I (Milwaukee county) is black.

The plaintiffs and defendants/defendants-intervenors both presented detailed statistical testimony on the degree of "racial polarization"; that is, black political cohesion and white bloc voting. Professor John Zipp, on behalf of the plaintiffs, and Professor Ronald Weber, on behalf of defendants/defendants-intervenors, evaluated past elections to determine whether white and black citizens differed in their voting patterns; the conclusions reached by the two professors were quite similar. However, there were two major differences in the data collected by them: (1) Professor Zipp did not estimate white and black support for candidates in judicial elections in which a black candidate did not run, while Professor Weber included such elections in his analysis; and (2) Professor Weber's analysis was limited to elections between 1981 and 1996, while Professor Zipp's analysis considered elections between 1972 and 1996.

According to the defendants and defendants-intervenors, the principal reason for excluding elections prior to 1981 is that such elections may be stale. I do not believe that "staleness" is an adequate reason completely to disregard this evidence. ***See Nipper***, 39 F.3d at 1538 (the mere fact that the analyzed elections were somewhat dated does not reduce their probative value in § 2 vote dilution cases). Hence, in assessing the political cohesiveness of black voters in Milwaukee county, I will consider judicial elections which involved white and black candidates going back to 1972.

Based on Professor Zipp's estimates, there have been a total of 16 contested primary and general elections for the circuit court (or former county court) in which black candidates competed against white candidates for a seat on the court. (¶s' Exs. 1 & 3.) In each of the 16 elections, black voters selected the black candidate as their preferred candidate in that they gave a majority or plurality of their support to the black candidate. Black support for black candidates ranged from 70.96% to 100% in the ten general elections and from 52.9% to 94%, with an average of 72.4%, in the six primary elections. (¶s' Ex.1, Table 4.) In all 16 of the elections studied by Professor Zipp, the black candidate was the preferred candidate of black voters.

In ***Gingles***, the Supreme Court concluded that black support for black candidates which ranged from 71% to 92% in 11 out of 16 primary elections and from 87% to 96% in most general elections was overwhelming and demonstrated that blacks were politically cohesive even though black candidates were not the preferred candidate of black voters in some elections. ***Gingles***, 478 U.S. at 59, 80-82.

The defendants and defendants-intervenors contend that evidence of low black voter turnout (measured as the percentage of total voters who turn out that are black) cuts against a finding of black political cohesiveness. The evidence at trial showed that only two of the past 15 election years involved black voter turnout of more than 10%: (1) 1988 - 12.9% in the primary election and 14.25% in the general election; and (2) 1996 - 12.8% in the general election.

(▲s' Exs. 4, 8, and 18.) Even with one or more black candidates running for judicial office, black voters made up more than 10% of all voters who turned out to vote in only one election: the 1996 general election between incumbent Judge Stamper and challenger Robert Crawford in which the black turnout was 12.8%. Black voter turnout for the other six elections which involved a black candidate in this time period ranged between 3.3% and 8.8%. (▲s' Ex. 4.)

The defendants and defendants-intervenors maintain that low turnout reflects voter apathy and precludes a finding that particular candidates received substantial minority support. The plaintiffs acknowledge the weak turnout of black voters but argue that depressed rates of minority political participation do not rebut a finding of political cohesion.

In the instant case, I do not believe that low turnout among black voters sufficiently undercuts the plaintiffs' showing of black political cohesion. Admittedly, black turnout measured as the percentage of blacks who turnout among ***all*** voters is small. However, turnout measured in terms of the percentage of the black voting age population that turns out to vote is significantly higher in a number of elections. For example, 15.6% of the black voting age population turned out to vote in 1984 for black candidate Russell Stamper, 14.9% of the black voting age population turned out to vote in 1987 for black candidate Stanley Miller and 25% of the black voting age population turned out to vote in 1996 for incumbent Judge Stamper.

The uncontested testimony of Professor Peter Eisinger, called by the plaintiffs, demonstrated that significant racial disparity exists in Milwaukee county between blacks and whites in the areas of housing, employment, education and income. (¶s' Exs. 4 & 5; Stipulation (¶¶ 52-67.) Hence, the defendants and defendants-intervenors have not proved that low voter turnout among black voters is due to voter apathy as opposed to the socioeconomic burdens endured by those voters.

In view of the above, I find that the plaintiffs' showing of black political cohesion is credible and has not been

successfully rebutted by the defendants and defendants intervenors.

C. White Bloc Voting

The third ***Gingles*** prerequisite requires a determination whether the white majority votes as a bloc sufficiently to permit it "usually" to defeat the black candidate.

In ***Gingles***, five of the justices of the Supreme Court ruled that § 2 liability does not arise from a mere showing that black and white voters generally give their votes to different candidates. Despite contrary expressions by a minority of the Court, it was the clear position of five justices that a broader inquiry into "special circumstances" must be made before a court can conclude that a white voting bloc exists and is "legally significant." The defendants cogently contend that nonracial causes of the voting preferences of the white majority should be considered in weighing the bloc-voting issue. ***Gingles***, 478 U. S . at 83.

Justice O'Connor analyzed this issue in her concurring opinion by stating that:

> [e]vidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.
>
> I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial

> hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. . . . The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of ***all*** evidence concerning voting preferences other than statistical evidence of racial voting patterns. ***Id.*** at 100-01. (emphasis added).

The principle that courts should undertake the additional inquiry into the reasons for, or causes of, electoral losses pointed to by the plaintiffs was announced and applied by the ***Supreme Court in White v. Regester***, 412 U.S. 755 (1973) and ***Whitcomb v. Chavis***, 403 U.S. 124 (1971).

The parties differ in their opinion as to which elections should be analyzed. The plaintiffs insist that only contested elections are relevant to the issue of racially polarized voting. The defendants and defendants-intervenors argue that the unique, low-profile nature of judicial elections make the interrelationship between uncontested elections and incumbency pertinent. In Wisconsin, judicial elections are nonpartisan in the sense that the candidates do not run on party tickets.

In ***Gingles***, the Supreme Court recognized incumbency as one of the "special circumstances" that could explain a deviation from a pattern of racially polarized voting such that uncontested elections involving an incumbent should be excluded from a court's consideration. 478 U.S. at 57. ***Gingles***, of course, involved a § 2 claim in the context of ***legislative*** elections. The unexciting nature (usually, at least) of judicial elections suggests that the effects of incumbency tend to be even more significant in judicial races than in legislative campaigns. As discussed below, the evidence in this case shows that most judicial incumbents, including black incumbents, run for reelection without opposition. Since it is clear that incumbency frequently plays a determining role in judicial elections, I find that the impact of incumbency must be considered in the vote dilution inquiry. ***Nipper***, 39 F.3d at

1535-36 (effects of incumbency should be considered in analyzing the value of statistics concerning the polarized voting inquiry and when making the ultimate determination of § 2 liability under the totality of the circumstances).

Out of the 16 contested judicial elections which involved a black candidate since 1972, the plaintiffs' analyst opined that white voters twice gave a majority or near majority of their vote to the black candidate. He concluded that Russell Stamper received 49.8% of the white vote in the election of April 3, 1984, and that Clarence Parrish received 62.6% of the white vote in the election of April 7, 1981. In the remaining 14 elections, white support for the black candidate ranged from 9% to 34.5% in primary elections and from 22.7% to 44.5% in general elections.

Overall, average white support for black candidates in the six primary elections was 23.68%. (¶s' Ex.l, Table 4; ¶s' Ex.3, Table 1 and p.5.) Each of the six primaries had at least three candidates and one, in February 1989, had seven. (▲s' Ex. 17.) Moreover, in these six primaries, white support for the white candidates ranged from 4.6% to 50%. In five of these six primaries, the black candidate advanced to the general election. Thus, irrespective of the level of white support, it cannot be said that white bloc voting "usually" defeated the minority preferred candidate in these primary elections.

The average white support for black candidates in the 10 general elections was 40.25%. (¶s' Ex.l, Table 4; ¶s' Ex. 3, Table 1 and p. 5.) Out of these 10 contested general elections, the black preferred candidate won twice: in 1984, when Russell Stamper received 49.8% of the white vote and, in 1981, when Clarence Parrish received 62.6% of the white vote.

The plaintiffs suggest that this statistical evidence alone establishes the existence of white bloc voting because it is comparable to that found in ***Gingles*** where white support for the black candidates ranged from 8% to 50% in primary elections and from 28% to 46% in the general elections in the districts where a § 2 violation was affirmed. 478 U.S. at

80-82. However, our inquiry does not begin and end with statistics. The Supreme Court recognized that there was no benchmark for "legally significant" white block voting. ***Gingles***, 478 U.S. at 56 ("legally significant" white bloc voting will vary from district to district.)

Uncontested elections involving incumbent black judges are also relevant to the issue of white bloc voting in the context of judicial elections. If a white majority voting bloc is able "usually" to defeat a black candidate, then one might expect to see, with some degree of frequency, challenges by white candidates against black incumbents, and, where a challenge was mounted, the black candidate losing. This pattern is not present in the instant case.

In the past 25 years, five black incumbent state circuit court or county judges were challenged by white candidates; of these five incumbents, three lost their bid for re-election. However, two of these losses occurred before 1980. Since 1980, black incumbents have received opposition from a white candidate on only three occasions. Of these three instances, the black incumbent lost in one: Judge Stamper was defeated in 1996 by a white challenger, Robert Crawford. In this same time period, six black incumbent circuit or county judges went unchallenged. (▲s' Exs. 4 & 17.) These election results are summarized in the table attached as appendix B to this decision and order.

In the last ten years, there have been five challenges to full-term incumbent state circuit court judges and three with respect to state court of appeals judges. Four of the challenged incumbent circuit court judges were white, and one, Judge Stamper, was black. The incumbent lost or withdrew in three of the five circuit court races. In 1987, Judge Gorenstein withdrew when challenged by two candidates: one white and one black. In 1986, Judge Seraphim lost to a white challenger, and in 1996, Judge Stamper lost to a white challenger. Two of the full-term white incumbent state court of appeals judges -- Judges Wedemeyer and M.T. Sullivan -- lost in their court of appeals races to white challengers; the full-term white incumbent, Judge Moser, withdrew when

challenged by a white candidate. These election results are identified in exhibit B to the stipulation which is attached as appendix A to this decision and order.

In my opinion, the infrequency with which black incumbent judges have actually been challenged undercuts the statistical evidence of white bloc voting in contested general elections over the past 25 years. The specific facts relating to the eight contested general elections in the circuit and county courts analyzed by the plaintiffs' witness in which black candidates lost to white opponents further highlights the inadequacy of proof that the candidates preferred by black voters lost "on account of race." 42 U.S.C. § 1973(a). A review of these eight elections demonstrates that in at least six, the divergent voting patterns among white minority voters is better explained by nonracial factors such as name recognition, campaign expenditures or the particular vulnerability of a given candidate.

In 1979, Clarence Parrish, a black attorney, was defeated by Ralph Adam Fine, a white attorney and well-known legal affairs reporter for a local television station. Subsequently, Clarence Parrish, who had been appointed to the bench by Governor Dreyfus, defeated a white challenger in 1981. In the 1981 race, he enjoyed white support of 62.6%. This significant level of white support suggests that his earlier defeats in 1973 and 1979 were not motivated by racial animus.

Stanley Miller, who is black, was defeated in 1987 by John Franke, a prominent Assistant United States Attorney who had gained publicity when he successfully prosecuted several members of a so-called organized crime family. By the time Mr. Miller announced his candidacy, Mr. Franke had already locked up virtually all of the major endorsements including those of the Governor, the Mayor of Milwaukee and several prominent black leaders. Mr. Franke also out-spent Mr. Miller during the campaign.

In 1989, Sheila Parrish, who is black, was defeated by Louise Tesmer, a white long-time member of the Wisconsin Assembly. Ms. Tesmer had a significant fundraising edge over Ms. Parrish.

Louis Butler, who is black, lost his 1989 challenge to a white ***incumbent*** judge, Dominic Amato, who had obtained a large number of major endorsements and enjoyed a substantial edge in fundraising.

Most recently, just a few months ago, Judge Stamper, a black incumbent circuit judge, lost to a white challenger, Robert Crawford. The election campaign was unusually bitter. Judge Stamper did not respond publicly to Mr. Crawford's public accusations that his opponent was guilty of domestic abuse, had committed violations of judicial ethics and had aggressively advocated racial quotas in the election of judges.

In sum, I find that the plaintiffs have failed to meet their burden of establishing the existence of legally significant white bloc voting. The frequency with which judicial incumbents, including black incumbents, go unchallenged and the nonracial causes of the electoral losses often sustained by black candidates demonstrate that bloc voting by white voters will not ***consistently*** defeat minority candidates. ***Gingles***, 478 U.S. at 100-01(O'Connor, J., concurring).

Even if the minority's view on the law regarding racial 11 bloc voting were controlling and even if all three of the ***Gingles*** prerequisites had been met, I do not believe (as I point out in the following paragraphs) that the important "totality of the circumstances" test supports a finding that black voters in Milwaukee county are denied the same opportunities to participate in the political process and to elect representatives of their choice enjoyed by other voters. 42 U.S.C. § 1973 (b).

III. TOTALITY OF THE CIRCUMSTANCES

In assessing the totality of the circumstances, the nature of a judicial election must be kept in mind. Unlike legislators, judges are not "representatives" of the voting public. Trial and appellate court judges are not elected to be responsive to their voters nor are they expected to advance the agenda of any particular interest group. Indeed, such conduct would constitute a violation of the ethical oath which judges in Wisconsin swear to uphold. Wis. Stat. § 757.02.

As a result of the special characteristics of judicial elections, a number of factors, in addition to those identified in the Senate Report, have been considered by courts when analyzing the totality of the circumstances. Two additional factors that have been assessed are: (1) the state's interest in maintaining an electoral system for judges that incorporates a link between a trial judge's jurisdiction and the areas of residency of his or her voters, ***Houston Lawyers Ass'n***, 501 U.S. at 427; ***Southern Christian Leadership Conference of Alabama v. Sessions,*** 56 F.3d 1282, 1294 (11th Cir. 1995***), cert. denied***, _ U.S. _, 116 S.Ct. 704 (1996) ["SCLC"]; ***Nipper***, 39 F.3d at 1535; ***LULAC***, 999 F.2d at 868; and (2) the number of minority candidates eligible to serve on the bench, ***SCLC***, 56 F.3d at 1296; ***LULAC***, 999 F.2d at 865-66.

A. State's Interest in Maintaining the At-Large Election of Judges

The Supreme Court expressly noted the legitimacy of a state's interest in having its trial judges elected from geographical districts that are co-extensive with the court's jurisdiction. ***Houston Lawyer's Ass'n***, 501 U.S. at 426. While rejecting this interest as creating a categorical exclusion from § 2 coverage, the Court recognized that a state's interest in having its judge's elected by all voters within a court's jurisdictional boundaries might preclude a remedy involving the redrawing of boundaries or subdividing districts, or even a finding that vote dilution has occurred under the totality of the circumstances. ***Id.***

The defendants and defendants-intervenors argue that even if the plaintiffs were able to satisfy each of the three ***Gingles*** preconditions, any inference of vote dilution is outweighed by the strong interest Wisconsin has in maintaining the current at-large system of electing trial and appellate court judges. The defendants and defendants-intervenors insist that the current system best balances the state's compelling interest in ensuring that judges are electorally "accountable" or "responsible" to every resident of the jurisdiction in which they primarily exercise jurisdiction. According to the defendants and defendants-intervenors, this system simultaneously maximizes

judicial independence by ensuring that the pool of voters responsible for electing each judge is sufficiently broad to minimize the risk that distinct factions will be able unduly to influence sitting judges or those seeking judicial office in the exercise of their judicial function.

The state's interest in linking jurisdictional and electoral bases has been recognized by a number of federal appellate courts as "substantial." ***SCLC***, 56 F.3d at 1294; ***Cousins***, 46 F.3d at 577; ***LULAC***, 999 F.2d at 872. I agree. Irrespective of the race of individual litigants, trial and appellate judges in Milwaukee county make rulings that affect all county residents. Wisconsin, therefore, has insisted that the state's trial and appellate judges answer to all county voters at the ballot box.

The plaintiffs raise two arguments challenging the legitimacy of Wisconsin's interest in linkage. The plaintiffs contend that the use of visiting judges and the fact that nonresidents come before Milwaukee county judges illustrate that Wisconsin does not consistently apply the policy of linking jurisdictional and electoral territories. Both of these arguments lack merit.

In my opinion, the occasional use of a visiting judge when a trial or appellate judge is ill or vacationing does not amount to an abandonment of the interests behind linkage. In fact, as recognized by the court of appeals for the fifth circuit, "insofar as linkage involves the appearance of judicial fairness and independence, visiting judges are not inconsistent with its purposes." ***LULAC***, 999 F.2d at 874.

The plaintiffs' contention that the linkage interest is illusory because trial and appellate judges in Milwaukee county often adjudicate matters involving litigants who are not residents of the county also warrants scant attention. The fact is, trial and appellate judges in Milwaukee county make decisions that impact primarily upon residents within their jurisdiction.

In addition to challenging the legitimacy of the state's interest in linkage, the plaintiffs assert that the linkage interest deserves little weight because means are available to

accommodate the linkage interest while simultaneously remedying the dilutive effects of the at-large electoral system. First, the plaintiffs propose two types of subdistricting remedies which incorporate at-large, county-wide approval either immediately following an election by a particular subdistrict or midway through the term of the judge elected by the subdistrict. The plaintiffs also point to the possible use of limited voting or cumulative voting.

In their complaint and throughout trial the plaintiffs have consistently maintained that Wisconsin's at-large electoral system violates § 2 of the VRA. Nevertheless, all of the remedies identified by the plaintiffs would utilize at-large elections at least at some point in the original electoral or in the subsequent retention process. Hence, I find it difficult to accept the plaintiffs' assertion that such schemes are "remedies" for the current voting process objected to by the plaintiffs.

I am not convinced that the remedial programs pointed to by the plaintiffs detract from the weight to be afforded the state's interest in linkage. Wisconsin adopted its judicial election agenda about 150 years ago; surely it was not designed to minimize the election opportunities of blacks. The state of Wisconsin has a solid, long-standing interest in the at-large election of state judges.

In sum, I find that Wisconsin's interest in maintaining a link between jurisdictional and electoral bases is substantial. This does not mean that such interest alone always defeats § 2 liability. However, I do not believe such an interest can be overcome by marginal evidence of vote dilution. ***LULAC***, 999 F.2d at 876 (more than margarial evidence of vote dilution is required to outweigh state's interest in linkage); *Bradley v. Work*, 916 F. Supp. 1446, 1473 (S.D. Ind. 1996). Had I determined that the evidence presented by the plaintiffs satisfied all of the ***Gingles*** preconditions, it would not have been adequate to outweigh the state's valid and legal interest in linkage.

B. Other Factors Relevant to Totality of Circumstances

The "totality of circumstances" test is a major factor in determining whether black voters in Milwaukee county have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973(b) I will address ten of the remaining factors which are germane to that test.

1. Pool of Eligible Candidates

A functional and realistic view of the process for selecting state judges in Milwaukee county must include an examination of the available pool of minority candidates. In this case, the plaintiffs have consistently pointed to the small number of minority circuit and court of appeals judges in Milwaukee county as proof that the opportunity for black voters in Milwaukee county is infringed by the existing at-large electoral system. However, those voters may only vote for eligible candidates. Only lawyers with at least five years of practice experience in Wisconsin are eligible to serve on the circuit or appellate benches. ***Wis. Const.***, art. VII § 24(1).

Of the attorneys eligible to run for a circuit or appellate court judge in Milwaukee county, 2.9% are black. Currently, black judges in Milwaukee county comprise over 6.5% of the circuit court judges in Milwaukee county; three of 46 of the circuit court judges in Milwaukee County are black. As noted previously, Judge Stamper's departure from the bench, in January 1997, will not alter this percentage because M. Joseph Donald, who is black, has recently been appointed as a circuit court judge for Milwaukee county. Thus, while the number of black circuit judges in Milwaukee county at first appears to be small, it is, in fact, greater than the number predicted from black representation among eligible attorneys in Milwaukee county.

Given that the percentage of "eligible" black attorneys in Milwaukee county is only 2.9%, and there are only four court of appeals seats in District I (Milwaukee county), the likelihood is not great that even one of these judges would be black. I conclude that the current racial composition of the circuit and appellate court judges in Milwaukee county is

consistent with the racial composition of the judicial candidate pools. As aptly noted by the court of appeals for the fifth circuit, "[t]he absence of eligible candidates goes along way in explaining the absence of minority judges." ***LULAC***, 999 F.2d at 866.

2. History of Official Discrimination

A factor identified in the Senate Report is whether there is a pattern of any official discrimination that adversely affects the rights of minorities to register, vote or otherwise participate in the democratic process. There is no evidence in the record to indicate that such a pattern exists in either Wisconsin or Milwaukee county. Wisconsin has never imposed a poll tax, a literacy test or any other mechanism that might diminish the ability of members of a racial minority group to vote. In fact, as I noted in my decision and order of June 10, 1996, Wisconsin has a very liberal voting access program; Wisconsin citizens are permitted to register and vote at the polling station on election day with only proof of residency required.

3. Racially Polarized Voting

Another factor identified in the Senate Report is the extent to which voting is racially polarized. I have already determined that the plaintiffs have not met their burden of proof to demonstrate the existence of white bloc voting. Because that ***Gingles*** precondition directly relates to the existence of racially polarized voting, I do not believe that this factor can be said to support the plaintiffs' § 2 vote dilution claim.

4. Use of Voting Practices That May Enhance the Opportunity for Discrimination

The plaintiffs attempt to invoke this factor by contending that Milwaukee county's boundaries for the circuit court and court of appeals are unusually large. I find nothing unusual about the county's boundaries. Circuit courts and counties are coterminous in all but six of Wisconsin's counties. Of the 72 counties in the state, there are only two counties which are geographically smaller than Milwaukee county.

As to the court of appeals, the population in District I gives each voter in Milwaukee county a greater say in the election of their appellate judges than voters in the other three appellate districts.

The plaintiffs also suggest that the lack of a subdistrict residency requirement hinders minority access to the political process since all candidates reside outside the minority neighborhoods. I find this argument somewhat disingenuous insofar as none of the plaintiffs' own proposed remedial schemes includes a residency requirement.

5. Access to Minority Slating Process

The plaintiffs concede that this factor is irrelevant in the instant case because no candidate slating process is employed in Wisconsin.

6. Extent to Which Members of the Minority Group Bear the Effects of Discrimination

A further factor identified in the Senate Report is the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health which may hinder their ability to participate in the political process. I have already concluded that the record contains evidence illustrating the existence of a significant disparity in Milwaukee county between blacks and whites in the areas of housing, employment, education and income. However, the plaintiffs have not adequately shown that these socioeconomic differences are attributable to past discrimination in Milwaukee county or in the state of Wisconsin.

Further, the evidence also shows that black participation is actually high in partisan and fall elections; this refutes the claim that black voters are politically hindered due to their lower socioeconomic status. (▲s' Exs. 125 & 126.)

7. Overt or Subtle Racial Appeals

In the Senate Report, a court is instructed to consider, under the totality of the circumstances, whether campaigns

have been characterized by overt or subtle racial appeals. While the plaintiffs insist that this factor supports the inference of vote dilution, they are able to point to only one judicial election which appears to have involved racial appeals: the 1996 general election between Judge Stamper and Robert Crawford.

Assuming that the Stamper/Crawford election did, in fact, involve hostile racial conduct, one election in the past 25 years is hardly enough to prove a pattern.

8. Minority Electoral Success in Public Offices

Courts are also advised to weigh, under the totality of the circumstances, the extent to which members of the minority group have been elected to public offices in the jurisdiction. Aside from Milwaukee county circuit court and court of appeals races, which have already been discussed in some detail in this decision, blacks have enjoyed meaningful electoral success in Milwaukee county and in the state of Wisconsin. Plaintiffs' professorial witness, Peter Eisinger, noted that "black Milwaukeeans enjoy representation on the city council and in the state Legislature." (¶'Ex. 4, p.25.) Electoral results confirm this success. Vel Phillips, a black, was elected in 1978 as Secretary of State. Black candidate, Richard Artison, was elected Sheriff of Milwaukee county in 1984 and re-elected three times thereafter. State Representative Spencer Coggs, who is black, testified that he came from a family with a long history of political success in Milwaukee county and the state of Wisconsin.

9. Responsiveness of Elected Officials to the Needs of the Minority Group

An additional factor that in some cases is considered to have probative value in § 2 vote dilution cases is whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the minority group. The plaintiffs have not alleged, nor was any evidence presented at the trial, showing that judges in Milwaukee county fail to judge in a fair and impartial manner or that the judges impermissibly base their decisions on the race of the parties, witnesses or victims.

The plaintiffs' assert that because the executive committee of the First Administrative Judicial District, the policymaking arm of the state circuit court, has no black representative, it could be perceived as being unresponsive to the needs of the black community in Milwaukee county. This argument is totally speculative. More importantly, on August 1, 1996, Maxine White, a black circuit court judge in Milwaukee county, became a member of the committee.

10. The Policy Underlying the Electoral Process at Issue

The final factor identified in the Senate Report as germane to the totality of circumstances inquiry is whether the policy underlying the state's interest in maintaining its electoral system is tenuous. My earlier conclusion that the state of Wisconsin has a substantial interest in maintaining its 150-year-old at-large system for electing judges necessarily constitutes a rejection of the arguments raised by the plaintiffs with respect to this last factor (which are the same as those advanced earlier in this decision).

IV. CONCLUSION

The plaintiffs have failed to meet their burden of proof on the third ***Gingles*** precondition which requires proof of legally significant white bloc voting. The plaintiffs also have failed to qualify under § 2 of the VRA because, under the totality of the circumstances test, black voters in Milwaukee county do not have less opportunity than other voters to participate in the political process and to elect judges of their choice. The plaintiffs have not met the burden of proving that the present electoral structure for electing judges "minimize[s] or cancel[s] out" the plaintiffs' ability to elect their preferred candidates. ***Gingles***, 478 U.S. at 48. Accordingly, the plaintiffs' claim under § 2 of the VRA will be dismissed, with prejudice.

Pursuant to the stipulation of the parties, the plaintiffs-intervenors agreed to "dismiss their complaint with prejudice" if the plaintiffs did not prevail on the merits. Because all of the plaintiffs' claims will be dismissed, the plaintiffs-intervenors are directed to serve and file a notice of

voluntary dismissal, with prejudice, no later than Monday, August 12, 1996.

Under 42 U.S.C. § 19731(e), a "court in its discretion, may allow the prevailing party a reasonable attorney's fee" in an action, such as this one, "to enforce the voting guarantees of the fourteenth or fifteenth amendments." Because all of the claims against the defendants and defendants-intervenors will be dismissed, with prejudice, the defendants and defendants-intervenors are prevailing parties and are entitled to an award of attorney's fees under 42 U.S.C. § 19731(e). However, in my opinion, only the plaintiffs, not the plaintiffs-intervenors, should be ordered to pay the reasonable attorneys' fees incurred by the defendants and defendants-intervenors.

The defendants and defendants-intervenors will be directed to serve and file a joint statement of reasonable attorneys, fees no later than Friday, August 23, 1996. The plaintiffs may serve and file their objections, if any, no later than Friday, September 6, 1996.

ORDER

Therefore, IT IS ORDERED that the plaintiffs' claim under § 2 of the VRA be and hereby is dismissed, with prejudice and with costs.

IT IS ALSO ORDERED that, pursuant to the stipulation of the parties, the plaintiffs-intervenors be and hereby are directed to serve and file a notice of voluntary dismissal, with prejudice, no later than Monday, August 12, 1996.

IT IS FURTHER ORDERED that the plaintiffs, Milwaukee Branch of the NAACP, Felmers Chaney, Vincent Knox and Barbara White, be and hereby are ordered to pay the attorneys' fees of the defendants and defendants-intervenors pursuant to 42 U.S.C. § 19731(e).

IT IS FURTHER ORDERED that the defendants and defendants-intervenors be and hereby are directed to serve and file a joint statement of reasonable attorneys' fees no later than Friday, August 23, 1996. The plaintiffs may serve and file their objections, if any, no later than Friday, September 6, 1996.

Dated at Milwaukee, Wisconsin, this 1st day of August, 1996.

/s/ Myron L. Gordon
Myron L. Gordon
U.S. District Judge

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 94-C-1245

MILWAUKEE BRANCH OF THE N.A.A.C.P.; FELMERS CHANEY; VINCENT KNOX and BARBARA WHITE,
Plaintiffs,

RAMON ARELLANO VALDEZ and THE FEDERATION FOR CIVIC ACTION, INC.,
Plaintiff-Intervenors,

v.

GOVERNOR TOMMY THOMPSON; SENATE PRESIDENT BRIAN D. RUDE; SENATE MAJORITY LEADER MICHAEL G. ELLIS; SENATE MINORITY LEADER ROBERT JAUCH; ASSEMBLY SPEAKER WALTER J. KUNICKI; ASSEMBLY MAJORITY LEADER DAVID M. TRAVIS; ASSEMBLY MINORITY LEADER DAVID T. PROSSER, JR.; MILWAUKEE COUNTY BOARD OF ELECTION COMMISSIONERS; COMMISSIONER MOLLY KORANDA; COMMISSIONER WEBSTER HARRIS, JR.; COMMISSIONER TILLIE BICHANICH; CITY OF MILWAUKEE BOARD OF ELECTION COMMISSIONERS; COMMISSIONER ROSEMARIE MCDOWELL; AND COMMISSIONER JEAN C. NOVSHEK,
Defendants,

WISCONSIN ASSOCIATION OF TRIAL JUDGES, PATRICK T. SHEEDY and FREDERICK A. HENDERSON,
Defendants-Intervenors

STIPULATION

Plaintiffs, by their attorneys, Richard Saks, of Perry Lerner & Quindel, S.C., and Brenda Wright and Todd A. Cox, of the Lawyers' Committee for Civil Rights Under Law, and defendants, by their attorneys, James E. Doyle, Attorney General, Peter C. Anderson and Kathleen M. Falk, Assistant Attorneys General, and defendant-intervenors, by their attorneys, Thomas L. Shriner, Jr., Richard M. Esenberg and Michael J. Aprahamian, of Foley & Lardner, stipulate that the Court may find the following:

1. Plaintiffs are the Milwaukee Branch of the NAACP, an organization whose members include many registered black voters residing in the City and County of Milwaukee, and individual voters Felmers Chaney, Vincent Knox, and Barbara White, who are black citizens of the United States and registered voters residing in the City and County of Milwaukee.

2. Plaintiff-intervenors are Ramon Valdez and the Federation for Civic Action, Inc. Ramon Valdez is a Hispanic registered voter residing in the City and County of Milwaukee. Federation for Civic Action, Inc. is an association of Hispanic registered voters in Milwaukee County. The plaintiff-intervenors were granted leave to intervene on behalf of Hispanic citizens.

3. Defendants are government officials alleged to be involved in the organization and/or administration of the court system in Milwaukee County.

4. Defendant, Tommy Thompson, is the duly elected, qualified, and acting Governor of the State of Wisconsin. As such, the Governor is the chief executive officer of the State of Wisconsin charged with the duty of implementing and executing the laws of the State. Defendant, Tommy Thompson, is being sued in his official capacity.

5. At the time the complaint was filed, defendant, Brian D. Rude, was the duly elected, qualified, and acting President of the Wisconsin State Senate. The current holder of that office is Fred Risser.

6. At the time the complaint was filed, defendant, Michael G. Ellis, was the duly elected, qualified, and acting Majority Leader of the Wisconsin State Senate. The current holder of that office is Chuck Chvala.

7. At the time the complaint was filed, defendant, Robert Jauch, was the duly elected, qualified, and acting Minority leader of the Wisconsin State Senate. The current holder of that office is Michael G. Ellis.

8. At the time the complaint was filed, defendant, Walter J. Kunicki, was the duly elected, qualified, and acting Speaker of the Wisconsin State Assembly. The current holder of that office is David T. Prosser, Jr.

9. At the time the complaint was filed, defendant, David M. Travis, was the duly elected, qualified, and acting Majority Leader of the Wisconsin State Assembly. The current holder of that office is Scott R. Jensen.

10. At the time the complaint was filed, defendant, David T. Prosser, Jr., was the duly elected, qualified and acting Minority Leader of the Wisconsin State Assembly. The current holder of that office is Walter J. Kunicki.

11. Defendant, the Milwaukee County Board of Election Commissioners, is the responsible agency under § 7.21, Wis. Stats., for conducting judicial elections for Circuit Court in the First Judicial Administrative District and for appellate judges in Appellate District I. Defendants, Molly Koranda, Webster Harris, Jr., and Tillie Bichanich, are the members of the Board of Election Commissioners for the County of Milwaukee, and are being sued in their official capacities. Defendant, the City of Milwaukee Board of Election Commissioners, is alleged to be a responsible agency for conducting such elections. Defendants, Rosemarie McDowell and Jean C. Novshek, are the members of the Board of Election Commissioners for the City of Milwaukee, and are being sued in their official capacities. Pursuant to agreement of the parties, the Court granted the request of the city and county defendants to be excused from representing themselves in the lawsuit, and to turn their defense over to the State Attorney General's office.

Order dated April 6, 1995, at 2 (per Judge Reynolds, U.S.D.J.)

12. The Milwaukee County Election Commission and the City of Milwaukee Election Commission perform purely ministerial functions with respect to the conduct of elections within their respective jurisdictions, including (in the case of the County Commission) elections of state judges. Neither has any powers or responsibilities with respect to the boundaries of trial court circuits, or the manner in which judges are elected to a branch within a circuit.

13. Defendant-intervenor, Wisconsin Association of Trial Judges ("WATJ"), is a voluntary association of present and former-state trial judges, which has approximately 177 members. Its members include trial judges throughout the state, and its members are citizens, residents, and taxpayers of Wisconsin and the counties in which they reside. WATJ's members are also registered voters of Wisconsin and their respective counties. At least 33 of WATJ's members are sitting Milwaukee County circuit judges.

14. Defendant-intervenor, Patrick T. Sheedy, is a Milwaukee County Circuit Court Judge and is Chief Judge of the First Judicial Administrative District. He is also a citizen, resident, and taxpayer of, and lawyer and registered voter in both the State of Wisconsin and the County of Milwaukee. He has been permitted to intervene in his personal capacity.

15. Defendant-intervenor Frederick A. Henderson is a Rusk County Circuit Court Judge. He is a citizen, resident, and taxpayer of, and lawyer and registered voter in both the State of Wisconsin and the County of Rusk He has been permitted to intervene in his personal capacity.

16. Chief Judge Sheedy and at least 32 other members of WATJ are sitting Milwaukee County Circuit Court Judges elected by the voters of Milwaukee County in at-large judicial elections pursuant to the election system established pursuant to Article VII, Sections 6, 7 & 9 of the Wisconsin Constitution, and § 753.01, 753.06, and 753.061 of the Wisconsin Statutes.

17. All judges of courts of record in Wisconsin must be attorneys who have been licensed to practice in the state for at least five years. Wis. Const., art. VII, § 24(1).

18. Article VII, Sec. 6, of the Wisconsin Constitution provides: "The legislature shall prescribe the number of judicial circuits, making them as compact and convenient as practicable, and bounding them by county lines."

19. Article VII, Sec. 7, of the Wisconsin Constitution provides for the election of circuit court judges, stating: "For each circuit there shall be chosen by the qualified electors thereof one or more circuit judges as prescribed by law."

20. Article VII, Sec. 5(2) of the Wisconsin Constitution provides: "For each district of the appeals court there shall be chosen by the qualified electors thereof one or more appeals judges as prescribed by law, who shall sit as prescribed by law."

21. Circuit Court judges in Wisconsin are elected to a branch of the Circuit Court by an at-large vote of all the electors within the circuit. Judicial elections are nonpartisan and are held in the spring, separate from partisan elections (except that in presidential election years, the judicial general election is held at the same time as the Presidential Preference Primary). Wis. Const., art. VII, § 9; Wis. Stat. § 8.11(3).

22. The circuit-wide election of judges in circuits whose boundaries are coincident with the boundaries of one of more counties dates to Wisconsin's admission to the Union in 1848. This system has been continuously maintained ever since.

23. All counties in the State of Wisconsin, including Milwaukee, constitute a single judicial circuit, with the exception of Buffalo and Pepin Counties, Florence and Forest Counties, and Menominee and Shawano Counties, wherein the two counties mentioned together constitute one judicial circuit. Wis. Stat. § 753.06. Milwaukee has constituted a single circuit since 1882. See 1882 Wis. Laws, ch. 55 (detaching Waukesha County from second judicial circuit leaving only Milwaukee County to comprise circuit). In

addition, since 1978, when judicial administrative districts were created, Milwaukee County has been the only county in the First Judicial Administrative District and is the only county to comprise its own Judicial Administrative District.

24. The Circuit Court for Milwaukee County presently has 46 branches, with each branch consisting of one judgeship and constituting a circuit court with all the powers and jurisdiction possessed by other circuit courts, including those with only one branch and judge. Wis. Stat. § 753.06(1) and 753.061(1). Circuit judges are elected to individual branches.

25. From 1849 to 1978, there also existed a system of county courts within all Wisconsin counties, including Milwaukee County. 1849 Wis. Iaws, Ch. 86; Wis. Stat. § 253.01 (1975).

26. Judges of the county courts were also elected on an at-large basis. 1849 Wis. Laws, Ch. 86, § 1; Wis. Stat. § 253.05 (1975).

27. In 1978, county courts wee abolished and sitting county judges were made judges of newly-created branches of the circuit court. Wis. Stat. § 753.07(1). The constitutional provisions governing the election of judges "by the qualified electors therefore were not changed. Wis. Const., art. VII, § 7.

28. Along with the abolition of county courts in 1978, amendments to the Constitution in 1977 also mandated, for the first time, an intermediate level appellate court, the Court of Appeals. Wis. Cont, art. VII, § 5. The new Court of Appeals was established by implementing legislation. 1977 Wis. Laws, Ch. 187.

29. While the Court of Appeals is a single court, the Constitution authorizes the Legislature to combine the judicial circuits of the state into one or more districts for the Court of Appeals. Wis. Const., art. V1I, § 5. Court of Appeals judges for each district are chosen by the qualified electors of the district voting on an at-large, district-wide basis.

30. The Legislature has divided the Court of Appeals into four districts coterminous with the boundaries of one or more counties. Wis. Stat. § 752.11. Milwaukee County, which

is, by far, the most populous county in the state, is the only county which constitutes a single district and has since the creation of the Court of Appeals in 1978. Wis. Stat. § 752.11.

31. The court of appeals sits in panels of three judges, except in a limited class of cases that are decided by one judge. Wis. Stat. § 752.31. Although each district of the Court of Appeals considers cases in panels of three, the number of judges within each district is determined by state legislation. Wis. Const., art. VU, § 5(2); Wis. Stat. § 752.03.

32. District I, consisting of Milwaukee County, currently has four judges. Wis. Stat. § 752.13, 752.11. The rest of the state, outside of Milwaukee County elects twelve Court of Appeals judges, who serve on the Court's other three districts. District II, with chambers in Waukesha, has four judges, District III, with chambers in Wausau, has three judges. District IV, with chambers in Madison, has five judges. Secs. 752.15, 752.17, 752.19., Stats.

33. Circuit court and court of appeal judges are elected in non-partisan elections, and serve six-year terms. Terms of the various branches do not all expire in the same year. Candidates for the circuit court and court of appeals may reside anywhere in Milwaukee County.

34. For all judicial elections in Wisconsin, including the election of judges to the Milwaukee County Circuit Court and the Wisconsin Court of Appeals District I, if more than two candidates file for a particular seat, a primary election is held to narrow the field to the top two vote-getters. Wis. Stat. § 8.11(3). The top two vote-getters then run in the general election. If only two candidates file for a judicial seat, only a general election is held. Although the winner of the general election need only receive a plurality of votes cast and there have been a few judicial elections in Milwaukee County in which a write-in candidate received more than a handful of votes, there has been no election since 1972 in which the candidate winning the general election did not receive the majority of the votes cast.

35. Mid-term vacancies on either the circuit court or the Court of Appeals are filled by gubernatorial appointment. Wis.

Const., art. VII, § 9. The Governor's appointee must then stand for election to a full term at the next election. Wis. Stat. § 8.56(4)(f).

36. The Wisconsin Constitution does not place any limits on the Governor's discretion in filling such vacancies. The manner in which the Governor exercises this power of appointment varies from administration to administration, but generally involves the use of some type of commission, consisting of attorneys and non-attorneys, to screen applicants and make recommendations.

37. Currently, the Governor, by executive order, maintains an Advisory Council on Judicial Selection, including seven permanent members and additional members from each circuit or district to participate in filling vacancies within that circuit or district. In the event of a circuit court vacancy, notice is mailed to all attorneys within the circuit. In the event of an appellate court vacancy, notice is provided through an insert in the state bar newsletter, use of public media, and by mailings to county bar associations, judges, and clerks of court within the district. Applications are reviewed and, where necessary, the field is narrowed to 10. Following that process, interviews are conducted and the Council reports to the Governor, recommending at least three, but no more than five, persons to fill the vacancy. The executive order sets forth minimum standards for the evaluation of prospective appointees.

38. Since first taking office in January 1987, Governor Thompson has appointed 13 judges to the Milwaukee County Circuit Court. Exhibit A to this stipulation sets forth the identity of the applicants, the number of times each applied, their race, whether they have been recommended, and whether they have been appointed. Governor Thompson will be making another appointment before July 31, 1996, to fill Branch 3, left vacant by Patricia Curley's March 1996 election to the Court of Appeals. Four African Americans and nineteen whites applied for this position. One African American and two whites have been recommended for the Governor's consideration.

39. According to the 1980 Census, in 1980, Milwaukee County had a total population of 964,988, of which 709,906 were residents ages 18 and above. By 1980, Milwaukee County's black population had reached 149,435, or 15.5% of the county's total population. The number of black residents of voting age was 85,977, representing 12.11% of the county's voting age population.

40. According to the 1990 Census, the total population of Milwaukee County is 959,275. The total non-Hispanic white population is 698,864 (72.9 percent); the total non-Hispanic black population is 193,583 (20.2 percent); and the total Hispanic population is 44,671 (4.7 percent).

41. According to the 1990 Census, the total voting age population of Milwaukee County is 712,973. The total non-Hispanic white voting age population is 558,273 (78.3 percent); the total non-Hispanic black voting age population is 115,598 (16.2 percent); and the total Hispanic voting-age population is 25,644 (3.6 percent). African-Americans (both Hispanic and non-Hispanic) made up 16.34% of Milwaukee County's voting age population, or 116,499 out of a total voting population of 712,973.

42. According to the 1990 Census, the total population of the City of Milwaukee is 628,088, of whom 189,408 (30.2 percent) are black. The total voting age population of the City of Milwaukee is 455,948, of whom 112,542 (24.7 percent) are black (both Hispanic and non-Hispanic).

43. According to the 1990 Census, 98% of all blacks in Milwaukee County live in the City of Milwaukee, while 56% of all whites in Milwaukee County live in the City of Milwaukee. Eighty percent of Wisconsin's African-American population and 50% of the state's Hispanic population lives in Milwaukee County. Milwaukee County is home to 15.5% of the state's non-Hispanic, white population.

44. A summary of the results for elections to county court, circuit court and the Court of Appeals in Milwaukee County is set forth in Exh. B to this stipulation.

45. A complete report of the election results, including vote totals, for Milwaukee county in elections to the circuit

court, county court, Court of Appeals, and Supreme Court are set forth in Defendants' Exhibit 85, and is incorporated herein. The parties will supplement this Stipulation by providing the Court a complete report of certain "exogenous elections" to be attached as Exhibit C to this Stipulation.

46. One of plaintiffs' experts, Mr. Ian Millett, prepared two reports describing potential subdistricts that could be drawn for the election of circuit and court of appeals judges in Milwaukee County. These reports are Plaintiffs' Exhibits 8 and 9. The parties stipulate that, if Mr. Millett were called as a witness at trial, he would testify to the facts and conclusions set forth in his reports, Plaintiffs' Exhibits 8 and 9. The parties do not object to the admission of those reports (including attachments) into evidence. Any party can identify during trial portions of Mr. Millett's deposition testimony to be entered into the record.

47. The Constitution of 1848, art. III, § , limited suffrage to white males 21 years old and above (along with certain adult males of Indian decent), but permitted the Legislature to extend the suffrage to others if the amendatory law was approved by the voters at a general election. The session of the Legislature in 1849 extended the vote to adult male "colored persons," 1849 Wis.Law, ch. 137, subject to such a vote. The voters approved the amendment in the general election in November 1849. *Gillespie v. Palmer*, 20 Wis. 544 (1866). In *Gillespie,* a black citizen sued a group of election inspectors in Milwaukee County who had refused to receive his vote because he was black. The Wisconsin Supreme Court held that the defendants had wrongfully denied plaintiff his right to vote because black suffrage became a law when the issue was submitted to the people in 1849, and a majority of the votes cast on the subject were in favor of black suffrage.

48. Wisconsin did not employ devices such as poll taxes or literacy tests to deprive black citizens of the right to vote, once the right to vote was established. Currently, Wisconsin permits same-day registration and voting, and

imposes only a 10-day residency requirement. Wis. Stat. § 6.55.

49. Milwaukee County comprises about 241 square miles of land.

50. Of the 72 counties in the state, there are only two counties which are geographically smaller in size than Milwaukee County, and they are Ozaukee and Pepin Counties.

51. At no time in Wisconsin's history, nor that of Milwaukee county, has there been any candidate slating process for candidates for judicial office.

52. According to the 1980 Census, blacks in Milwaukee earned a median income of $14,956, while whites in Milwaukee earned a median income of $17,069.

53. According to the 1990 Census, blacks in Milwaukee earned a median income of $15,64, while whites in Milwaukee earned a median income of $26,848.

54. According to the 1980 Census, the per capita income of whites in Milwaukee was $7,865, while the per capita income for blacks in Milwaukee was $4,707.

55. According to the 1990 Census, the per capita income of whites in Milwaukee was $13,909, while the per capita income for blacks in Milwaukee was $6,833.

56. According to the 1980 Census, 43,390 (29.9%) blacks in Milwaukee were in poverty while 37,018 (8.1%) whites in Milwaukee were in poverty.

57. According to the 1990 Census, 78,797 (41.9%) blacks in Milwaukee were in poverty, while 39,522 (10.8%) whites in Milwaukee were in poverty.

58. According to the 1980 Census, 66.3% of whites in Milwaukee had completed high school or better, while 52.6% of blacks in Milwaukee had completed high school or better.

59. According to the 1990 Census, 77.0% of whites in Milwaukee had completed high school or better, while 60.2% of blacks in Milwaukee had completed high school or better.

60. According to the 1980 Census, the unemployment rate for blacks in Milwaukee was 13.9%, while the unemployment rate for whites in Milwaukee as 5.2%.

61. According to the 1990 Census, the unemployment rate for blacks in Milwaukee was 18.6%, while the unemployment rate for whites in Milwaukee was 4.9%

62. According to the 1980 Census, 51.0% of whites in Milwaukee owned homes, while 33.8% of blacks in Milwaukee owned homes.

63. According to the 1990 Census, 51.7% of whites in Milwaukee owned homes, while 29.7% of blacks in Milwaukee owned homes.

64. According to the 1980 Census, 20.2% of white households in Milwaukee were without automobiles, while 39.6% Of black households in Milwaukee were without automobiles.

65. According to the 1990 Census, 17.4% of white households in Milwaukee were without automobiles, while 42.7% of black households in Milwaukee were without automobiles.

66. According to the 1980 Census, 3.3% of white households in Milwaukee were without telephones, while 10.6% of black households in Milwaukee were without telephones.

67. According to the 1990 Census, 2.7% of white households in Milwaukee were without telephone, while 11.6% of black households in Milwaukee were without telephones.

68. There are two accredited law schools in the State of Wisconsin; they are the University of Wisconsin (U.W.) Law School in Madison and Marquette University Law School in Milwaukee. The Chairman of Admissions of U.W. Law School is Professor John Kidwell. The Assistant Dean of Admissions at the Marquette University Law School is Ms. Geraldine Clausen. If the Chairman and Assistant Dean of the two law schools were called as witnesses at trial, each of

them would testify to the facts and conclusions set forth in paragraphs 69 and 70, below, for each of their law schools.

University of Wisconsin Law School

69. The admissions policy at the University of Wisconsin Law School has been generally the same for over the past 25 years and may be described as follows:

a. The U.W. Law School has an affirmative action admissions policy that employs academic and non-academic factors for the selection of student applicants. Nonacademic factors include minority status and ether factors, such as geographical diversity, experience in the workforce, etc.

b. It is the view of Professor John Kidwell, chairman of Admissions at the U.W. Law School, that it is not more difficult for minority students to get accepted into the U.W. Law School than white students over the past twenty-five years.

c. As a member of the law school faculty since 1972, and having spoken with former chairs of the admission committees, Professor Kidwell has been familiar with admissions policy for about 24 years. Professor Kidwell has served on the admissions committee for about the past five years; he is currently chair of the admissions committee and has been the chair for about the last three years.

d. Consideration of diversity factors permits admission of students, including minority students, with lower GPA and LSAT test scores than the average academic background of other students who are admitted.

e. The University of Wisconsin Law School makes efforts to recruit minority students, including attendance by the Dean of Admissions at college fairs to recruit minority applicants, recruiting applicants among students at historically black colleges, and connecting minority student applicants with enrolled minority students, by, for example, inviting at no cost minority applicants to the annual banquet held for minority students by the law school.

Marquette University Law School

70. The admissions policy at Marquette University Law School may be described as follows:

a. The current written admissions policy states that both quantitative and qualitative factors will be considered in the selection of law school applicants.

b. Some of the factors considered include: qualities that enhance the diversity of the student body; applicants from different cultural and experiential backgrounds; and applicants who are members of historically disadvantaged groups or groups that have been under represented in the legal profession.

c. The factors considered today for admission are generally consistent with the factors that have been utilized by Marquette University Law School for the past twenty-five years.

d. It is the view of Ms. Geraldine Clausen, Assistant Dean of Admissions at the Marquette University Law School, that it is not more difficult for minority students to get accepted into the Marquette University Law School than white students over the past twenty-five years.

e. Over the years, Marquette University Law School has employed an increasingly assertive posture to recruit minority applicants, including attending functions which minority students attend, contacting minority students at colleges, etc.

RICHARD SAKS

/s/
Attorney for Plaintiffs

Perry, Lerner & Ouindel, S.C.
823 North Cass Street
Milwaukee, WI 53202-3908

JAMES E. DOYLE
Attorney General

PETER C. ANDERSON
Assistant Attorney General

KATHLEEN M. FALK
Assistant Attorney General

/s/
Attorneys for State Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595
(608) 266-1350

THOMAS L. SHRINER, JR. (WBN 1015208)
RICHARD M. ESENBERG (WBN 1005622)
MICHAEL J. APRAHAMIAN (WBN 1020115)

/s/
ATTORNEYS FOR DEFENDANT-INTERVENORS WISCONSIN ASSOCIATION OF TRIAL JUDGES, PATRICK T. SHEEDY AND FREDERICK A. HENDERSON

FOLEY & LARDNER
Firstar Center
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367

Direct Inquiries to:

(414) 297-5601 (TLS)
(414) 297-5517 (RME)
(414) 297-5516 (MJA)

EXHIBIT A

MASTER LIST OF APPLICANTS FOR JUDICIAL VACANCIES DURING GOVERNOR THOMPSON'S TERM

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Abrahamson, Sherman			X		
Aiken, Jeffrey P.			X		
Amato, Dominic			X	X	X
Baker, Richard J. (4)			X		
Berg, Kenneth R. (5)			X	X (1)	
Blask, James F. (4)			X		
Blumenfield, Charles F.			X		
Bock, William F.			X		
Bottoni, Thomas			X		
Brash, William W., III (4)			X		
Britton, Ronald P.	X				
Bunde, Peter W. (2)				X (2)	

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Butler, Louis B., Jr. (4)	X			X (1)	
Cannon, Peter J. (3)			X		
Carter, John J. (3)			X		
Castro, Robert C.		X			
Cimpi, Dennis R. (7)			X		
Conen, Jefferey			X		
Cooper, Thomas R. (6)[1]			X	X	X
Crawford, Robert (2)			X		
Derus, Margaret M. (2)			X		
Dugan, Timothy (4)			X	X (2)	X
Dwyer, Michael J. (2)			X		
Edhlund, Sandra A.			X		
Emmerson, Milton G. (2)	X				
Flanagan, Mel (3)			X	X (1)	X
Fraker, Donald R.			X		

[1] John P. Savage withdrew after he was appointed but before he was sworn in; he was replaced by Thomas R. Cooper.

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Frenn, Thomas L.			X		
Gehrke, Harold D. (3)			X		
Gimbel, Seymore (2)			X		
Glamm, Steven H. (3)			X		
Goldberger, Ronald S.			X	X	X
Gonring, Micheal J.			X	X	
Gordon, Bonnie (3)			X		
Grady, Lance S.			X		
Greene, George W., Jr. (4)			X	X (2)	X
Grove, Patricia L. (2)			X		
Hale, Christopher T.			X		
Hansen, Susan A. (2)			X		
Hart, Richard H.			X		
Hayes, John P.			X		
Hayes, Thomas E. (4)			X		

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Held, Harvey			X		
Hicks, Joan L.	X				
Higgins, John P.					
Huntley, Ronald P. (2)	X				
Johnson, Marcus T. (2)	X				
Juech, Stephen B.			X	X	
Kaminski, G. Steven (2)			X		
Klaus, Warren J. (2)			X		
Klaver, Mary A.			X		
Klimetz, Frederick F.			X		
Klump, Eric (2)			X	X (2)	
Kraemer, Robert E., Jr. (2)					
Konkol, Daniel Lee			X		
Kremers, Jeffery (6)			X	X (3)	X
Lamelas, Elsa C. (2)		X		X (2)	X

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Lampiris, Ann R. (2)			X		
Liska, Frank J., Jr. (2)			X		
Machi, Anthony J. (7)			X		
Malone, Calvin R.	X				
Mann, Douglas (4)			X		
Marohl, David W.			X		
Matestic, Fred (6)			X	X (4)	
McBride, Dennis (2)			X		
McElligott, F. Brian			X		
McIlnay, Bruce A.			X		
McKnight, Robert A.			X		
Mellencamp, Thomas D.			X		
Michelstetter, Stanley (2)					
Miller, Stanley (3)	X			X (1)	X
Moroney, Dennis P. (3)			X	X (2)	X

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
Mountin, Mary J.					
Mukamal, Stuart S. (2)			X		
Noonan, Daniel A. (5)			X		
Parrish-Spence, Sheila M. (6)	X				
Payne, Mary H. (5)			X	X (1)	
Phillips, William, Jr. (3)	X				
Pikofski, Seymour (7)			X		
Poulos, Mary Ellen (3)			X		
Puglisi, Carmello A. (2)			X		
Robles, David		X			
Roden, William J. (2)			X		
Rogers, Mark J.			X		
Rothstein, Stephanie G. (4)			X		
Russell, Patrick			X		
Rustad, Janice M.			X		

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
St. Clair, Fred (2)	X				
St. Ores, Sheryl A. (5)			X		
Sankovitz, Richard J.			X	X	
Savage, John P. (5)			X	X (1)	X
Schalig, Suzanne K. (2)			X		
Schellinger, Jaqueline (2)			X	X (2)	X
Simpson, Douglas J. (3)	X				
Spalatin, Mario S. (5)			X		
Starck, Douglas H.			X		
Tepper, Jerome A. (4)			X		
Tesmer, Louise			X		
Thornton, Roesmary (2)			X		
Wedemeyer, Ted E.			X	X	X
Weigel, William J.			X		
White, Carol Lynn (2)			X		

NAME	BLACK	HISPANIC	WHITE	RECOMMENDED	APPOINTED
White, Maxine (2)	X			X (2)	X
Witkowaik, Timothy M.			X		

EXHIBIT B

MILWAUKEE COUNTY JUDICIAL ELECTIONS, 1972-96

Year	Branch	Incumbent	Challengers
1972	Cir. 6	Landry*	None
	Cir. 7	Dreschler retired	J. Foley*
	Cir. 10	Neelen*	None
	Cir. 18	New	Seraphim*
			Grant
	Cty. 9	Miech*	None
	Cty. 11	Bowman#	Jennaro*
			Berger
	Cty. 13	Phillips[1] (NA) #	Manian*
			Halloway
			Tilton
			Temple
1973	Cir. 1	Young retired	Ceci*
	Cir. 5	Podell*	None
	Cir. 8	O'Neill retired	Barron*
			Parrish[1]#
			Hayes
	Cir. 11	Steffes retired	Seraphim*
			Landry
	Cir. 12	Coffey*	None
	Cir. 17	O'Connell*	None
	Cty. 1	Shaughnessy*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
	Cty. 4	Kessler (NA)*	F. Miller# Nevers Crockett[1] Alexopoulos
	Cty. 5	Jennings*	None
	Cty. 10	McCormick*	None
1974	Cir. 2	Burns (NA)*	None
	Cir. 3	Decker*	None
	Cty. 6	Gram (NA)	Gorenstein* Beaudry
	Cir. 14	L. Foley*	None
	Cir. 18	Jackson[1] (NA)*	None
	Cir. 19	New	McCormick*
	Cty. 3	Evans (NA)*	None
	Cty. 14	New	Gram* Backus
1976	Cty. 2	M.T. Sullivan*	None
	Cty. 10	Gerlach (NA)*	None
1977	Cir. 4	Cannon*	None
	Cir. 15	Holz*	None
	Cir. 16	Moser*	None
	Cty. 7	Walstead retired	M.P. Sullivan*
	Cty. 8	Steinmetz*	None
	Cty. 12	Madden*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
	Cty. 13	Goulee (NA)*	Halloway# Blask
1978	CA. (6 yr.)	New	Decker*
	CA. (4 yr.)	New	Cannon*
	CA. (2 yr.)	New	Moser*
	Cir. 6	Landry*	None
	Cir. 7	J. Foley*	None
	Cir.10	Neelen retired	Wedemeyer*
	Cty. 9	Miech*	None
	Cty. 11	Jennero*	None
1979	1	Ceci*	None
	3	P. Curley (NA)*	Gramling# Wood
	4	Lampone (NA)*	Lowe* Eldridge
	5	Podell retired	Sheedy*
	8	Barron*	None
	16	St. Clair[1] (NA)#	Gardner* Brooks
	17	O'Connell*	None
	20	Shaughnessy*	None
	23	Kessler*	None
	24	Jennings*	None

* winner
\# survived primary
(NA) newly appointed judge
1 African-American
2 Native American
3 Hispanic

Year	Branch	Incumbent	Challengers
	34	New	Fine*
			C. Parrish[1]#
			Sosnay
	35	New	Randa*
			Lipscomb
	36	New	Callan*
			Backus#
			Connors
			Halloway
			Machi
1980	CA	Moser*	Seraphim
	2	Burns*	None
	25	Gorenstein*	None
	37	New	Connors*
			Schneider#
			Halloway
			St. Clair
1981	9	R. Curley*	None
	13	Manian*	None
	14	L. Foley*	None
	18	Jackson[1]*	None
	19	McCormick*	None
	21	C. Parrish[1] (NA)*	Gray
	22	Haese (NA)*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
	27	Doherty (NA)*	None
	33	Gram*	None
1982	CA	Randa (NA)	Wedemeyer*
	23	Geske (NA)*	Knoll
	35	Wells (NA)*	None
1983	1	Schudson (NA)*	Blask
	10	Randa*	None
	29	Gerlach*	None
1984	CA	M.T. Sullivan*	None
	9	Stamper[1] (NA)*	Steinle
	15	Holz*	None
	17	Wasielewski (NA)*	None
	26	M. P. Sullivan*	None
	31	Madden*	None
	32	Goulee*	None
1985	3	P. Curley*	None
	4	Lampone*	None
	6	Landry*	None
	7	J. Foley*	None
	12	Skwierawski*	None
	16	Gardner*	None
	28	Miech*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
	30	Crivello (NA)*	None
	34	Fine*	None
	36	Callan*	None
1986	CA	Moser*	None
	5	Sheedy*	None
	8	Barron*	None
	11	Seraphim	Kessler*
	14	C. Foley (NA)*	None
	20	Shaughnessy*	None
	24	Jennings*	Zander
	37	Connors*	None
1987	2	Burns*	None
	18	McMahon (NA)*	None
	19	McCormick*	None
	21	C. Parrish[1]*	None
	22	Haese*	None
	25	Gorenstein withdrew*	Franke*
			S. Miller[1]
	27	Doherty*	None
	33	Gram*	None
1988	CA	Wedemeyer	Fine*
	13	Manian*	None
	23	Geske*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
	35	Wells*	None
	38	New	Wagner*
			Rohlich
	39	New	Malmstadt*
			Seraphim#
			Poulos
			Halloway
1989	1	Schudson*	None
	10	Randa*	None
	11	Amato (NA)*	Butler[1]
	15	Goldberger (NA)*	None
	29	Gerlach*	None
	34	Wedemeyer (NA)*	None
	40	New	Tesmer*
			S. Parrish[1]#
			Konkol
			Machi
			Blask
			Kaiser
			Crawford
1990	CA	M. T. Sullivan*	None
	9	Stamper[1]*	None
	17	Wasielewski*	None
	26	M. P. Sullivan*	None
	31	Madden*	None
	32	Guolee*	None
	41	New	DiMotto*

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
1991	3	P. Curley*	None
	4	Lampone*	None
	6	Landry*	None
	7	J. Foley*	None
	12	Skwierawski*	None
	16	Gardner*	None
	28	Miech*	None
	30	Crivello*	None
	36	Callan	None
	42	New	Hansher*
1992	CA	Moser withdrew	Schudson*
	CA (5 yr.)	New	Wedemeyer*
	5	Sheedy	None
	8	Barron*	None
	14	C. Foley*	None
	20	Shaughnessy*	None
	24	Jennings retired	Kahn*
			Dugan
	37	Connors*	None
	43	New	Sykes*
			Halloway#
			McElligott
		New	Konkol*
	44		Moroney
	45	New	Donegan*

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
1993	1	White[1](NA)*	None
	2	Burns*	None
	10	Dugan (NA)*	None
	18	McMahon*	None
	19	McCormick*	None
	21	S. Miller[1] (NA)*	None
	22	Haese*	Blask
	25	Franke*	None
	27	Doherty*	None
	33	Gram*	None
	34	Schellinger[2](NA)*	None
	36	Kremers (NA)*	McNamara-McGraw
1994	CA	Fine*	None
	4	Flanagan (NA)*	None
	6	Greene (NA)	Brennan*
	13	Manian*	None
	20	Moroney (NA)*	None
	23	Lamelas[3] (NA)*	None
	28	Cooper (NA)*	None
	35	Wells*	None
	38	Wagner*	None
	39	Malmstadt*	None
	46	New	Gordon*

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

Year	Branch	Incumbent	Challengers
1995	11	Amato*	None
	15	Goldberger*	None
	29	Gerlach*	None
	40	Tesmer*	None
1996	CA	M. T. Sullivan	P. Curley*
	9	Stamper[1]	Crawford*
	17	Wasielewski*	None
	26	M. P. Sullivan*	None
	31	Madden retired	Noonan*
	32	Goulee*	None
	41	DiMotto*	None

*	winner
#	survived primary
(NA)	newly appointed judge
1	African-American
2	Native American
3	Hispanic

EXHIBIT C

MILWAUKEE COUNTY EXOGENOUS ELECTIONS SUMMARY OF ELECTION RESULTS

Date	Office/Election	Candidates	Vote
3/19/96	Milwaukee Mayor	Richard E. Artison (B) John Norquist	54,972 82,148
2/6/96	Supreme Court Primary	Charles B. Schudson Ralph Adam Fine Lawrence C. Bugge Stanley A. Miller (B) Harold V. Froehlich Ted E. Wedemeyer, Jr. Patrick Crooks	8,664 24,358 8,741 14,890 2,001 20,987 11,735
2/21/95	Milw. School Board At Large Primary	Robert Harris Jr. (B) John Gardner Rose Daitsman Robert Kurth	4,107 6,276 6,433 4,859

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
11/8/94	County Clerk	Larry Moore (B) Rod Lanser Jerry Broiztman	13,380 183,378 18,627
11/8/94	County Sheriff	R. Artison (B) Edward Buck Ardenne Bunde	203,198 13,359 11,289
9/13/94	County Sheriff Democratic Primary	R. Artison (B) Ralph Hall	21,286 3,936
11/3/92	County Sheriff	R. Artison (B) A. Bunde	328,207 35,966
9/8/92	5th Congressional District Democratic Primary	Terrance Pitts (B) Frederick Kessler Marc Marotta Tom Barrett R. Blenski Gerald Wilson	18,928 15,729 13,411 34,301 662 483

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
2/18/92	County Executive Primary	A. Polly Williams (B) Paul Matthews Thomas Ament Joseph Czarnezki James Wahner	22,061 21,380 45,765 43,779 32,556
2/18/92	Milwaukee Mayoral Primary	Michael I. McGee (B) Willie Lovelace (B) John Norquist Gregory Gracz Ira Robbins David Hall	7,028 1,266 49,180 36,444 4,790 978
4/2/91	Milw. Municipal Judge Branch 2	S. Miller (B) H. Halloway	22,799 17,282
2/19/91	Milw. School Board at Large Primary	Texas Bufkin (B) Bobby Lee Nichols (B) Pamela Penn	2,087 311 3,351

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
2/19/92	Milw. School Board at Large Primary	Kathleen Hart Stephen Thiel Neil Bromberg Michael Lisowski David Lucey	3,765 246 428 1,111 4,462
11/8/88	Fifth Congressional District	Helen Barnhill (B) Jim Moody	78,307 140,518
9/13/88	County Clerk Primary	Ben Johnson (B) Alan Eisenberg Thomas Zablocki James Cupertino Frank Kapusta Edward Anhalt Rod Lanser Mark Borkowski Dawn Sass	14,983 14,919 29,333 26,199 5,096 2,302 32,151 13,420 10,638

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
4/5/88	Democratic Presidential Primary	Jesse Jackson (B) Paul Simon Gary Hart Al Gore Bruce Babbitt Michael Dukakis Richard Gephart	94,952 9,834 1,243 37,084 392 115,817 1,452
2/16/88	Milw. Mayoral Primary	Lee Holloway (B) Willie Lovelace (B) Kevin Robinson (B) Sandra Sherman (B) John Norquist Marty Schreiber Donna Richards	7,865 411 613 677 40,575 44,894 5,983
4/7/87	Milw. School Board at Large	Gloria Mason (B) Doris Stacy	46,516 51,491

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
2/17/87	Milw. School Board at Large Primary	G. Mason (B) D. Stacy Kenneth Kraucunas	6,578 7,335 2,573
11/4/86	County Sheriff	R. Artison (B) Raymond Lorberter	224,911 11,116
9/9/86	County Sheriff Democratic Primary	R. Artison (B) Rick Rizzardi Wyatt Earp	52,814 4,363 6,405
9/9/86	U.S. Senate Democratic Primary	Gary George (B) Ed Garvey Matt Flynn Roman Blenski	10,577 26,131 29,648 2,098
2/18/86	Milw. Municipal Judge Branch 3 Primary	Orville Pitts (B) Ronald Britton (B) John Siefert James Gramling Emilio Lopez	2,364 1,851 5,108 4,155 500

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
2/18/87	Milw. School Board at Large Primary	William Weigel	890
		Reynold Ritter	3,478
11/6/84	County Sheriff	R. Artison (B)	316,345
		F. Kapusta	101,429
		John Logan	10,245
4/3/84	Democratic Presidential Democratic Primary	J. Jackson (B)	22,940
		Ernest Hollings	600
		Alan Cranston	1,266
		Walter Mondale	69.812
		George McGovern	2,543
		G. Hart	56,010
		John Glenn	1,547
		Rueben Askew	131
2/15/83	Milw. School Board Primary	Leon Todd (B)	2,212
		D. Stacy	10,287
		Gerald Farley	3,464
		Anthony Busalacchi	4,985

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
2/15/83	Milw. School Board Primary	James Koneazny Lawrence O'Neil	2,725 2,401
9/14/82	Secretary of State Democratic Democratic Primary	V. Phillips (B) Douglas LaFollette Ada Deer Lewis Mittness	30,993 71,145 54,862 8,021
9/14/82	5th Congressional District Democratic Primary	O. Pitts (B) R. Blenski Jim Moody Karen Lamb Marty Aronson Fred Kessler Harout Sanasarian Kevin O'Connor Warren Braun John Werner	15,264 1,409 17,073 3,814 11,797 15,804 2,812 10,368 13,320 539

Black candidates denoted as (B).

Date	Office/Election	Candidates	Vote
11/7/78	Secretary of State	V. Phillips (B) Frederic Seefeldt George Meyers	160,137 132,029 6,789
4/1/75 Black Candidates designated as (B)	Milw. Municipal Judge Branch 1	S. Miller (B) Ted Wedemeyer	12,945 45,343

Black candidates denoted as (B)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 94-C-1245

MILWAUKEE BRANCH OF THE N.A.A.C.P.; FELMERS CHANEY; VINCENT KNOX and BARBARA WHITE,
Plaintiffs,

RAMON ARELLANO VALDEZ and THE FEDERATION FOR CIVIC ACTION, INC.,
Plaintiffs-Intervenors,

v.

GOVERNOR TOMMY THOMPSON; SENATE PRESIDENT BRIAN D. RUDE; SENATE MAJORITY LEADER MICHAEL G. ELLIS; SENATE MINORITY LEADER ROBERT JAUCH; ASSEMBLY SPEAKER WALTER J. KUNICKI; ASSEMBLY MAJORITY LEADER DAVID M. TRAVIS; ASSEMBLY MINORITY LEADER DAVID T. PROSSER, JR.; MILWAUKEE COUNTY BOARD OF ELECTION COMMISSIONERS; COMMISSIONER MOLLY KORANDA; COMMISSIONER; WEBSTER HARRIS, JR.; COMMISSIONER TILLIE BICHANICH; CITY OF MILWAUKEE BOARD OF ELECTIONS COMMISSIONERS; COMMISSIONER ROSEMARIE MCDOWELL; AND COMMISSIONER JEAN NOVSHEK,
Defendants,

WISCONSIN ASSOCIATION OF TRIAL JUDGES; PATRICK T. SHEEDY and FREDERICK A. HENDERSON,
Defendants-Intervenor

ADDENDUM TO STIPULATION

Plaintiffs, by their attorneys, Richard Saks, of Perry, Lerner & Quindel, and Brenda Wright, of the Lawyers' Committee for Civil Rights Under Law, and defendants, by their attorneys, James E. Doyle, Attorney General, Peter C. Anderson and Kathleen M. Falk, Assistant Attorneys General, and defendant-intervenors, by their attorneys, Thomas L. Shriner, Jr., Richard M. Esenberg, and Michael J. Aprahamian of Foley & Lardner, stipulate that the Court may find the following:

67(a). Between 1980-1990, the African-American population I Milwaukee county increased by 41,820. For 1985-1990, in-migration into Milwaukee Count of all residents was 121,955, of which 18,666 were African-American. Of thee African-American in-migrants, 52% were below the poverty line, and 42.2% were high school graduates. Of the 90,319 white in-migrants, 11.97% were below the poverty line and 39.4% were college graduates.

RICHARD SAKS
/s/
Attorneys for Plaintiffs

PERRY, LERNER & QUINDEL, S.C.
823 North Cass Street
Milwaukee, WI 53502-3908

JAMES E. DOYLE
Attorney General

PETER C. ANDERSON
KATHLEEN M. FALK
Assistant Attorneys General
/s/
Attorneys for State Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595
(608) 266-1350

THOMAS L. SHRINER, JR. (WBN 1015208)
RICHARD M. ESENBERG (WBN 1005622)
MICHAEL J. APRAHAMIAN (WBN 1020115)

/s/
Attorneys for Defendant-Intervenors
Wisconsin Association of Trial Judges,
Patrick T. Sheedy and Frederick A.
Henderson

FOLEY & LARDNER
Firstar Center
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367

Direct Inquiries to:

(414) 297-5601 (TLS)
(414) 297-5517 (RME)
(414) 297-5516 (MJA)

APPENDIX B

Election Year	Incumbent	Election Status	Winner
1972	V. Phillips	WC	WC
1975	H. Jackson	U	Jackson
1979	F St. Clair	WC	WC
1981	H. Jackson	U	Jackson
1981	C. Parrish	WC	Parrish
1984	R. Stamper	WC	Parrish
1987	C. Parrish	U	Parrish
1990	R. Stamper	U	Stamper
1993	S. Miller	U	Miller
1993	M. White	U	White
1996	R. Stanper	WC	WC

U = uncontested

WC = white challenger

Appendix C

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstance's, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
DEC 9 1997
CLERK

No. 97-753

In The

Supreme Court of the United States

October Term, 1997

MILWAUKEE BRANCH OF THE NAACP, et al.,

Petitioners,

v.

GOVERNOR TOMMY THOMPSON, et al.,

Respondents,

WISCONSIN ASSOCIATION OF TRIAL JUDGES, et al.,

Respondent-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AND RESPONDENT-INTERVENORS IN OPPOSITION

JAMES E. DOYLE
Attorney General
PETER C. ANDERSON*
Assistant Attorney General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
(608) 266-9595
**Counsel of Record*

THOMAS L. SHRINER, JR.
RICHARD M. ESENBERG
MICHAEL J. APRAHAMIAN

Attorneys for Respondent-Intervenors

Foley & Lardner
Firstar Plaza
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

2 cpp

PARTIES TO THE PROCEEDING

Actual parties to the proceeding in the Court of Appeals were:

Milwaukee Branch of the N.A.A.C.P., Felmers Chaney, Vincent Knox and Barbara White,

Petitioners herein,

Wisconsin Governor Tommy Thompson, Wisconsin Senate President Fred A. Risser, Majority Leader of the Wisconsin Senate Charles Chvala, Minority Leader of the Wisconsin Senate Michael G. Ellis, Speaker of the Wisconsin Assembly Ben Brancel (David T. Prosser, Jr., held this office when the notice of appeal was filed), Majority Leader of the Wisconsin Assembly Steven M. Foti (Scott R. Jensen held this office when the notice of appeal was filed) and Minority Leader of the Wisconsin Assembly is Walter J. Kunicki, all appearing in their official capacities; all of these officials continue to hold the foregoing offices except that Scott R. Jensen is the current Speaker of the Wisconsin Assembly,

Respondents herein, and

Wisconsin Trial Judges Association, Patrick T. Sheedy and Frederick A. Henderson,

Respondent-intervenors herein.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 2

A. Proceedings below. 2

1. Proceedings in the district court. 2

2. Proceedings in the court of appeals. 3

B. Response to Petitioners' Factual Statement. 5

1. Wisconsin's reliance on at-large judicial elections. 5

2. Judicial candidates preferred by black voters have usually been elected. 6

3. Even limiting their analysis to elections in which black and white candidates competed, petitioners failed to prove the existence of legally significant white bloc voting. 7

4. Patterns of challenges to incumbents. 9

5. Paths to judicial office. 11

6. Socioeconomic differentials. 13

REASONS FOR DENYING THE PETITION 13

I. The Decision of the Court of Appeals Does not Conflict with this Court's Precedents Regarding the *Gingles* Precondition of White Bloc Voting. 14

II. The Court of Appeals Correctly Upheld the District Court's Consideration of Wisconsin's Interest in Balancing Judicial Independence and Accountability Through a System of At-Large Judicial Elections in Applying Section 2's Totality of Circumstances Standard. 17

CONCLUSION 21

CASES CITED

Abrams v. Johnson,
117 S. Ct. 1925 (1997) 14

Houston Lawyers' Ass'n v. Atty. Gen. of Texas,
501 U.S. 419 (1991) 17, 19

Johnson v. Transp. Agency, Santa Clara Cty., Cal.,
480 U.S. 616 (1987) 15

Thornburg v. Gingles,
478 U.S. 30 (1986) 3, 4, 5, 14, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 2

U.S. Const. amend. XV 2

Wis. Const. art. VII, § 6 5

Wis. Const. art. VII, § 7 6

Wis. Const. art. VII, § 24(1) 6

OTHER AUTHORITIES

42 U.S.C. § 1973(a) 4

Section 2 of the Voting Rights Act,
42 U.S.C. § 1973 . . . . . 2, 3, 13, 14, 15, 17, 19, 20

S. Rep. No. 97-417, at 30 (1982),
reprinted in 1982 U.S.C.C.A.N. 208 4

No. 97-753

In The

Supreme Court of the United States

October Term, 1997

MILWAUKEE BRANCH OF THE NAACP, et al.,

Petitioners,

v.

GOVERNOR TOMMY THOMPSON, et al.,

Respondents,

WISCONSIN ASSOCIATION OF TRIAL JUDGES, et al.,

Respondent-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AND RESPONDENT-INTERVENORS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet-Ap. 1a-13a) is reported as *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997). The district court's August 1, 1996, decision following trial (Pet-Ap. 1b-74b) is reported at 935 F. Supp. 1419 (E.D. Wis. 1996).

The district court also issued a decision dismissing petitioners' constitutional claims on motion for partial summary judgment. The decision is not included in the appendix to the petition but is reported at 929 F. Supp. 1150 (E.D. Wis. 1996).

JURISDICTION

Respondents and respondent-intervenors (herein, collectively, respondents) agree with petitioners' jurisdictional statement.

STATEMENT

A. Proceedings below.

1. Proceedings in the district court.

Petitioners are black voters and residents of Milwaukee County, Wisconsin, and a citizen organization to which they belong. Respondents are the Governor of Wisconsin and the state's legislative leadership, sued in their official capacities. Respondent-intervenors are the Wisconsin Trial Judges Association and two Wisconsin trial judges.

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin, alleging that Wisconsin's method of electing trial and appeals judges through at-large elections violated the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The district court granted summary judgment dismissing the petitioners' constitutional claims, holding that petitioners had failed to adduce any evidence that Wisconsin's method of electing judges had been adopted or maintained for discriminatory purposes. 929 F. Supp. 1150. Petitioners did not challenge the dismissal of their constitutional claims on appeal.

Following a seven-day trial to the court in July 1996, the district court issued a decision dismissing petitioners' Voting Rights Act claim. Pet-Ap. 1b-74b. The court first held that petitioners had "failed to meet their burden of establishing the existence of legally significant white bloc voting." Pet-Ap. 17b. In so holding, the court considered, *inter alia*, petitioners' estimates of white support for black candidates in judicial primary and general elections, the outcomes of contested primary and general judicial elections featuring black

candidates, patterns of electoral challenges to incumbent judges, including black incumbent judges, and evidence concerning the reasons for electoral losses identified by petitioners. Pet-Ap. 12b-17b.

The district court went on to hold that even if all three of the prerequisites under *Thornburg v. Gingles*, 478 U.S. 30 (1986), had been met, Section 2's "'totality of the circumstances' test [did not] support[ ] a finding that black voters in Milwaukee county are denied the same opportunities to participate in the political process and to elect representatives of their choice enjoyed by other voters." Pet-Ap. 17b. In reaching this conclusion, the court considered, *inter alia*, the state's interest in balancing judicial independence and accountability through a system of at-large elections, stating that this interest would not be outweighed by "marginal evidence of vote dilution" (Pet-Ap. 20b); the small pool of minority candidates eligible to run for judicial office in Milwaukee County; the absence of any history of official discrimination; disparities between black and white residents of Milwaukee County in areas of housing, employment, education and income, as well as the petitioners' failure to demonstrate these socioeconomic differences as attributable to any official or private discrimination; the success of black candidates in other elections; and the absence of any allegation or evidence of non-responsiveness on the part of Milwaukee County judges to the needs of minority residents. Pet-Ap. 17b-25b.

2. Proceedings in the court of appeals.

On appeal, petitioners challenged both of the district court's principal trial holdings. With respect to the issue of white bloc voting, the court of appeals concluded that the statistical evidence, "[t]ak[en] . . . at face value . . . leads straight to the conclusion that the district court's findings are not clearly erroneous." Pet-Ap. 6a-7a. The court of appeals rejected petitioners' challenge to the district court's consideration of patterns of challenges to incumbent judges, reasoning that "[o]ne good measure of white voters' willingness to support black candidates is the failure of white candidates to present

themselves for election even when a majority of the electorate is white." Pet-Ap. 7a.[1]

Petitioners also objected to the district court's consideration of non-racial explanations of electoral outcomes in its analysis of white voting patterns. The court of appeals agreed with petitioners that "[a] district judge . . . should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost, if white voters disapproved these candidates en masse." Pet-Ap. 8a (emphasis in the original). But the court of appeals also recognized, contrary to the petitioners' assertions, that the district court *had not* "assign[ed] to plaintiffs the burden of showing causation." Pet-Ap. 9a. Rather, the district court simply permitted the respondents to introduce evidence regarding the reasons that certain candidates lost in order to rebut an inference that black voters were denied an opportunity to elect candidates of their choice "on account of race." 42 U.S.C. § 1973(a).[2]

Although not required to do so in light of its affirmance of the district court's judgment under the third *Gingles* factor, the court of appeals also reviewed and affirmed the district

---

[1]Petitioners' arguments on appeal frequently rested on misinterpretations of the district court's decision. For example, petitioners interpreted the district court's decision as treating the electoral success of black candidates in uncontested elections as a "bar [to] a finding of legally significant white bloc voting . . . ." Appellants' Br. at 1. The district court imposed no such bar but had simply considered patterns of challenges to incumbents as one piece of evidence in a "searching practical evaluation of the [electoral system's] 'past and present reality'" *Gingles*, 478 U.S. at 45, quoting S. Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 208 (footnote omitted).

[2]The court of appeals observed, in any event, that "[v]ictories in other elections of candidates preferred by black voters, coupled with white voters' significant support for black candidates, relegates this part of the district court's analysis to the periphery." Pet-Ap. 9a.

court's decision under the totality of the circumstances standard. On appeal, petitioners objected to the district court's consideration of the size of the eligible minority candidate pool. The court of appeals ruled that consideration of this evidence was permitted. Pet-Ap. 9a-10a.

Petitioners also objected to the district court's analysis of Wisconsin's interest in preserving jurisdictional and electoral linkage for its judges. Petitioners' appellate argument interpreted the district court's decision as holding that such an interest either "justif[ied] the maintenance of a racially discriminatory scheme," (Appellants' Br. at 2) or "[p]revent[ed] the [f]ashioning of [r]elief" for such a system. *Id.* at 36. The court of appeals had little difficulty rejecting petitioners' interpretation, recognizing that the district judge "did not treat [the state's] interest as 'automatically' outweighing proof of vote dilution; he said no more than that the interest is weighty." Pet-Ap. 11a. The court of appeals properly understood petitioners to be asking it "to hold that . . . the only proper weight is zero (or, if not nil, so low that it can never tip the balance)." *Id.* The court of appeals did no more than reject the idea that the state's interest be assigned an automatic zero. Pet-Ap. 11a-13a.

B. Response to Petitioners' Factual Statement.

Petitioners' statement of the case reargues the trial evidence. As a result, it fails adequately to frame the issues claimed to warrant review. The following corrects or clarifies the principal omissions or inaccuracies contained in the petition's statement of facts. A fuller factual summary is contained in the district court's trial decision. Pet-Ap. 1b-74b.

1. Wisconsin's reliance on at-large judicial elections.

Wisconsin's reliance on at-large elections to elect its trial and appeals judges has been adhered to without either interruption or exception since Wisconsin's admission as a state in 1848. At all times since 1848, the Wisconsin Constitution has required elections in districts no smaller than a county, Wis. Const. art. VII, § 6, with each judge "chosen by the qualified

electors thereof." Wis. Const. art. VII, § 7. A synopsis of the institutional history of Wisconsin's judicial branch is contained in the parties' stipulation, incorporated in the district court's trial decision. Pet-Ap. 32b-35b. As previously noted, the district court dismissed petitioners' claim that this system had been created or maintained for discriminatory purposes as lacking any factual basis. 929 F. Supp. 1150.

2. Judicial candidates preferred by black voters have usually been elected.

Petitioners' discussion of voting patterns and election results is limited to elections in which black candidates ran. Yet, as the trial court found, only three percent of the pool of potential judicial candidates is black.[3] Not surprisingly, a significant number of elections are excluded from petitioners' analysis in which a black candidate did not run.

In elections involving candidates of all racial and ethnic backgrounds, candidates estimated to be supported by black voters were elected to the circuit court or court of appeals a majority of the time. From 1981 through 1996, the year of trial, the candidate preferred by black voters won ten of eighteen contested circuit court general elections. The black-preferred candidate lost six of these elections, although in one, the losing candidate is estimated to have been preferred by only a bare majority of black voters. (Estimation failed to identify a black-preferred candidate in two other elections.) Of the four contested elections for court of appeals since its creation in 1978, either the candidate preferred by black voters was elected or statistical estimation failed to identify a candidate preferred by black voters.

---

[3]Only attorneys who have been admitted to practice for at least five years may serve as judge. Wis. Const. art. VII, § 24(1).

3. Even limiting their analysis to elections in which black and white candidates competed, petitioners failed to prove the existence of legally significant white bloc voting.

Petitioners mischaracterize the evidence in the case when they describe elections in which black and white candidates competed as "characterized by consistent and severe racially polarized voting, with . . . the vast majority of white voters supporting the white candidate . . . ." Pet. at 3. Petitioners' support for this claim is that "[i]n 12 of 17 elections, white support for the black candidate ranged from 9% to 39%." *Id.* at 4.

This reductionist summary of white voting patterns is incomplete and misleading. Seven of these twelve elections were primary elections, with between three and seven candidates running and with voters permitted to vote for only one candidate. White support for black candidates in six of the primaries[4] ranged from 9% to 34.5%, with the black candidate advancing to the general election in five of them. A much larger percentage of white candidates - twelve of nineteen - did not survive these six primaries. Pet-Ap. 52b-61b. White

---

[4]In the seventh primary – the 1973 election for Circuit Court Branch 4 – the white incumbent and subsequent winner, Fred Kessler, appears to have been preferred by a plurality of black voters.

support for white candidates in these elections ranged from 4.6% to 50%. Pet-Ap. 14b.[5]

With respect to two-candidate general elections, between 1972 and 1996, there were ten contested general elections for circuit or county court in which one of the candidates was black. As estimated by petitioners' expert, white support ranged from a low of 22.7% for Stanley Miller in 1987, to a high of 62.6% for Clarence Parish in his 1981 election following appointment. As found by the district court, white support for black candidates averaged 40.25% over all ten general elections. Pet-Ap. 14b. The black candidate won 20% of these races, a percentage that is higher than the percentage of blacks among Milwaukee County's voting age population. Pet-Ap. 36b, para. 41.[6]

---

[5]Exhibit B to the parties' trial stipulation (Pet-Ap. 52b-61b) identifies every candidate who ran for county or circuit court or court of appeals in Milwaukee County between 1972 and 1996. The exhibit indicates incumbency, a candidate's status as a newly-appointed incumbent, the winners of the elections, candidates who advanced from primaries and whether a candidate was African-American, Hispanic or Native American. An error in the reproduction of this exhibit in the appendix to the petition omits to show that Fred St. Clair, a candidate for Circuit Court Branch 37 in 1980, was African-American. *See* Pet-Ap. 55b.

[6]In addition, there were two contested general elections for City of Milwaukee Municipal Court during the period 1972-1996, in which one of the candidates was black. As estimated by petitioners' expert, the white candidate was preferred by black voters in 1975. In 1989, the black candidate was preferred by both white and black voters, defeating a white challenger. Overall, since 1981, there were seven contested general elections for circuit or municipal judge in which one of the candidates was black. The black candidate was elected in three out of seven of these elections, receiving a majority of white support in two of these elections and roughly 50% in a third.

Petitioners' expert also estimated levels of white and black support in twenty-nine at-large, "exogenous" general and primary elections, *i.e.*, elections for offices other than circuit court or court of appeals, in which black and white candidates competed. In the eight general elections where black voters preferred the black candidate – in the other three general elections, the white candidate was preferred by both black and white voters – estimated white support for the black candidate averaged 64%.

Overall, in the eighteen judicial and non-judicial general elections examined by petitioners in which black voters supported black candidates against white opponents, the black candidate won eight of these races, receiving an average of 51% of the white vote. Finally, petitioners' expert did not find white voter turnout to increase in elections in which black candidates ran–a phenomenon known as counter-mobilization.

4. Patterns of challenges to incumbents.

An indirect measure of the existence or level of white bloc voting was the relative infrequency of challenges to black incumbent judges.

During the twenty-five year period 1972 to 1996, there were five such challenges. Prior to the 1996 election, the last time an incumbent black judge had been challenged was in 1984, while the last time an incumbent black judge had been defeated was in 1979. Until 1996, every such challenge had been to a judge recently appointed by the governor.[7] Appendix B to the district court's opinion (Pet-Ap. 74b) summarizes the election history of black incumbent judges. As can be seen, in seven consecutive elections beginning in 1981, every black incumbent judge was re-elected, in five cases

---

[7]Circuit judges are appointed in Wisconsin to fill vacancies resulting from a judge retiring or dying in office before the expiration of a full six-year term. An appointed judge does not serve the remainder of a predecessor's term but is required to stand for election at the next spring election, which is non-partisan. Pet-Ap. 32b, para. 21; 34b-35b, para. 35.

without opposition. During this same period, another two minority judges were elected without opposition. Pet-Ap. 60b.

More recently, from the time Governor Tommy Thompson took office in January 1987 until the time of trial, thirteen Milwaukee County circuit judges were appointed. Four of these judges were minorities, and two were black. Although none of the minority judges were challenged, three of the appointed judges faced an opponent when they first ran for election. One lost. Not only were none of the minority judges challenged, but in 1993, when both newly-appointed, black Circuit Judges Stanley Miller and Maxine White were required to first run for election, white challengers James Blask and Larraine McNamara-McBraw chose not to run against them, but ran instead against full-term white incumbent William Haese and newly appointed white incumbent Jeffrey Kremers. Pet-Ap. 58b-61b.

The only full-term African-American incumbent ever to face an election challenge was Judge Russell Stamper in 1996. Judge Stamper had previously won election in 1984 following appointment, receiving roughly 50% of white support. In 1990 he was re-elected without opposition. However, in 1996, a well-financed opponent succeeded in raising issues concerning Judge Stamper's personal and judicial character. As the district court found, the campaign was both unusually bitter and marked by Judge Stamper's failure to respond publicly to these accusations. Pet-Ap. 17b.[8] The evidence revealed that Judge Stamper's failure to respond was contrary to the advice of supporters and that his campaign was underfunded when compared to other incumbent judges' campaigns, as well as his own campaign twelve years earlier.

---

[8]Petitioners assert (Pet. at 7) that this election involved racial appeals, but the district court did not so find, but only assumed the fact for purposes of its "totality of circumstances" analysis. Pet-Ap. 24b.

Although a majority of white voters appear to have voted for his opponent in the 1996 election, Judge Stamper enjoyed substantial white support. Petitioners' expert testified that a shift of only 2% in the white vote would have resulted in Judge Stamper's reelection.[9]

The results of the 1996 contest were consistent with the trial evidence that challenges to full-term incumbent judges, while infrequent, always reflect a perceived special vulnerability on the part of the incumbent. Two of the four white, full-term circuit judges challenged between 1986 and 1993 were either defeated or withdrew from the election. Four of five white court of appeals judges lost, or withdrew from, contested elections. Pet-Ap. 54b-61b.

5. Paths to judicial office.

Petitioners contend that there exists a "clear racial divide in access to the bench under Wisconsin's electoral system . . . ." Pet. at 17. Specifically, black candidates are said to "face uncontested elections only if they are first appointed to a vacancy by the governor and none has ever reached the bench initially through a contested election." *Id.* Petitioners argue that in contrast, "white candidates are able to reach the bench through both election and appointment." *Id.*

---

[9]Subsequent to Judge Stamper's election defeat and after trial, Governor Thompson appointed another black lawyer to fill a vacancy in the circuit court. Pet-Ap. 21b. While occurring nine months after trial, and therefore not part of the trial record, we would note that in the 1997 spring election, the newly appointed judge was elected to a full term, without opposition.

But a black candidate ran for an open circuit or county court seat only six times between 1972 and 1996.[10] The district court heard substantial evidence regarding each of these elections, revealing that the winning white candidate possessed substantial political advantages unrelated to race.[11]

The subsequent career histories of black aspirants to judicial office are worth noting. Of the seven African-Americans who have run for circuit court since 1980, four have ultimately been elected, with or without opposition. A fifth, Louis Butler, was appointed and elected (without opposition) to the City of Milwaukee Municipal Court. Vel Phillips, who lost her election to County Court Branch 13 as a newly-appointed incumbent in 1973 (although receiving an estimated 44.5% of white votes), was subsequently elected Secretary of State of

---

[10]This assumes that the 1987 election for Circuit Court Branch 25 is regarded as an open seat election. In that race, incumbent Circuit Judge Gorenstein withdrew from the election after Assistant U.S. Attorney John Franke announced his candidacy. John Franke's strength as a candidate–strongly suggested by Judge Gorenstein's withdrawal–included his recent successful prosecution of the head of reputed organized crime family, and his having "locked up virtually all of the major endorsements including those of the Governor, the Mayor of Milwaukee and several prominent black leaders," Pet-Ap. 16b, before his opponent, black candidate Stanley Miller, had even announced his candidacy. At trial, now-Judge Miller described John Franke as having been "a very, very formidable opponent." July 12, 1996 Tr. at 60. This was the general election in which the black candidate received the smallest percentage of white support–approximately 23% by petitioners' expert's estimate.

[11]Petitioners' claim of divergent career paths fails to take into account the much larger number of failed white candidacies. The fact that white candidates were elected in twenty-one contested circuit or county court elections and five contested court of appeals elections, where the other candidates were also white, is not proof of divergent paths to judicial office, but a tautology. *See* Pet-Ap. 52b-61b.

Wisconsin in 1982, receiving a majority of the votes of Milwaukee County's white voters.

6. Socioeconomic differentials.

Consistent with the parties' stipulation (Pet-Ap. 38b-39b), the district court found "a significant disparity in Milwaukee county between blacks and whites in the areas of housing, employment, education and income." *Id.* at 23b. However, the district court went on to find that petitioners had "not adequately shown that these socioeconomic differences are attributable to past discrimination in Milwaukee county or in the state of Wisconsin." *Id.*

One fact providing context to the evidence of socio-economic differentials was that the socioeconomic status of blacks moving to Milwaukee County has been lower than the socioeconomic status of the African-American community as a whole. Pet-Ap. 38b-39b, 72b.

REASONS FOR DENYING THE PETITION

Petitioners ask that certiorari be granted in order to correct the court of appeals' claimed failure to adhere to this Court's precedents: (1) by "ruling that white bloc voting was not legally significant," Pet. at i, and (2) by ruling that "so long as [a] state has a 'sincerely held' belief that at-large elections are preferable," at-large judicial elections are exempt from the anti-dilution provisions of Section 2. *Id.* No other grounds for review are presented.

The specific "rulings" which are claimed to warrant review are largely misinterpretations of the court of appeals' decision. The decision below does not conflict with this Court's precedents. Rather, the Seventh Circuit's decision represents a proper application of established legal principles, including standards of review, to the district court's thoughtful examination of the trial evidence. Petitioners lost in the court of appeals because the district court's factual findings were fully supported by the record and because petitioners sought to recast those findings into rulings not made. Review of the court of appeals' decision will neither clarify nor advance the

interpretation of Section 2, but will simply delay finality in a case bearing on Wisconsin's right to secure and maintain a system of laws through the election of an independent and impartial judiciary.

I. The Decision of the Court of Appeals Does not Conflict with this Court's Precedents Regarding the *Gingles* Precondition of White Bloc Voting.

On appeal, petitioners asked the court of appeals to rule that the trial evidence *established* the existence of white bloc voting as a matter of law, notwithstanding the district court's finding that petitioners had failed to satisfy their evidentiary burden of demonstrating legally significant white bloc voting. The question for the court of appeals, therefore, was whether the evidence *permitted* the trial court's factual finding that legally significant white bloc voting had not been established, not whether the evidence required such a finding.

Answering this question, the court of appeals first determined that the parties' statistical estimates of white voter preferences led "straight to the conclusion that the district court's findings [were] not clearly erroneous." Pet-Ap. 6a-7a. Petitioners contend that the court of appeals misapplied *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), by purportedly "treating the description of the level of white bloc voting in two Georgia electoral districts" in that case "as a nationally applicable cut-off for significant white bloc voting." Pet. at 20.

This argument plainly misconstrues the decision of the court of appeals, which in no way attempted to establish any cut-off for white bloc voting. The court of appeals did no more than observe that the dramatically lower levels of white support in *Abrams* did not compel a finding of legally significant white bloc voting. Accordingly, the court of appeals correctly concluded that the trial court had not committed clear error by refusing to find legally significant white bloc voting as a matter of law based upon the much higher levels of white support for black-preferred candidates in Milwaukee County elections.

The petitioners also suggest that the court of appeals should have found "legally significant" white bloc voting based solely upon the failure of a handful of non-incumbent black judicial candidates to be elected to the bench without having first been appointed. Petitioners argue that "[a]n election system does not provide equal opportunity if white candidates have two routes to the bench – election and appointment – but black candidates supported by black voters have only one route – appointment." Pet. at 18. The only "precedent" identified in the petition that the court of appeals purportedly did not follow consists of Justice O'Connor's opinion concurring in the judgment in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616 (1987), a case concerning affirmative action job promotions permitted under Title VII. *See id.*

This issue does not warrant review, for it involves nothing more than the determination that the facts surrounding the six elections during the past twenty-five years in which a non-incumbent black candidate either ran for an open seat or challenged a sitting judge did not compel a finding of legally significant white bloc voting, particularly in light of the other evidence of white voting patterns. Moreover, non-statistical or "qualitative" evidence of the actual campaigns at issue revealed that when white candidates won in races in which black candidates competed, the candidate winning the election enjoyed considerable political advantages unrelated to race.

Petitioners also argue that the court of appeals "failed to recognize that lack of proportionality is always relevant to the Section 2 inquiry and supportive of a finding of vote dilution in this case." Pet. at 18. Petitioners' precise point is unclear. Certainly they do not mean to suggest that the court of appeals should have reversed solely because blacks do not occupy a share of Milwaukee County's judicial offices "proportionate" to the percentage of blacks in Milwaukee County's population. Section 2 would clearly prohibit any such conclusion. Nor can petitioners claim that the court of appeals failed to "consider" these statistics. It clearly did consider them, along with actual electoral results and the pool of eligible black candidates (*i.e.*,

lawyers with five years' experience), in concluding that these numbers did not compel a finding of legally significant white bloc voting.

Finally, petitioners argue that the Seventh Circuit "departed dramatically from this Court's teaching in *Gingles* when it relied almost entirely on black electoral success in uncontested elections to deny relief . . . ." Pet. at 20. The court of appeals did not rely "almost entirely" on this evidence. And the use of the phrase "to deny relief" suggests the court found a violation, but held it could not be remedied. In reality, the court of appeals considered and rejected the petitioners' argument that "the district court should have ignored the uncontested elections" altogether. Pet-Ap. 7a. The court of appeals rejected this exclusionary argument only after determining that the parties' statistical evidence of white voting behavior led "straight to the conclusion that the district court's findings [were] not clearly erroneous." Pet-Ap. 6a-7a.

This Court has never said that the ability of black candidates to deter potential challengers may not be considered in determining whether an at-large system of elections denies black voters the opportunity to elect candidates of their choice. Petitioners rely upon one of *Gingles'* definitions of white bloc voting, as requiring a showing "that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . – usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. However, *Gingles* did not involve judicial elections, in which running unopposed is not a "special" circumstance, but is a relatively common (and perhaps desirable) occurrence. The court of appeals did no more than affirm the district court's common-sense conclusion, consistent with the statistical evidence of white voting preferences in contested elections, that if being a black candidate or a candidate perceived as supported by black voters were a substantial liability among a significant percentage of white voters, successful challenges to black incumbents would be more frequent. As noted in our factual summary, prior to the crippled candidacy of the black incumbent in the 1996

election, the last successful challenge to a black incumbent judge had been in 1979, with the defeated candidate one who had only recently been appointed to office. That black incumbents have for nearly twenty years been successful in "discouraging" opponents negates an inference of white bloc voting that denies blacks voters the opportunity to elect candidates of their choice.

II. The Court of Appeals Correctly Upheld the District Court's Consideration of Wisconsin's Interest in Balancing Judicial Independence and Accountability Through a System of At-Large Judicial Elections in Applying Section 2's Totality of Circumstances Standard.

Petitioners also seek review because, as they read the Seventh Circuit's decision, that court would somehow "exempt" at-large judicial elections from the Voting Rights Act any time a state possessed a "sincerely held belief" in the merits of matching the boundaries of a court's jurisdiction to the boundaries of a judge's electoral base. Pet. at 21. This, petitioners argue, conflicts with this Court's decision in *Houston Lawyers' Ass'n v. Atty. Gen. of Texas*, 501 U.S. 419 (1991), which made clear that a state's interest in "linkage," while entitled to substantial weight, does not immunize at-large systems from scrutiny under Section 2.

Petitioners' argument rests entirely upon a false premise. The Seventh Circuit did not hold that a state's "'sincerely held' belief in the legitimacy of the structure of its own judicial election system" would always trump evidence of vote dilution. Pet. at 22. To the contrary, petitioners construct a straw-man by plucking a phrase from the last sentence of the court of appeals' decision, tearing it from the context in which it was written, and vesting it with a meaning that a reading of the full decision simply does not support. The language relied upon by the petitioners did not give the "linkage" interest dispositive weight, but rather summarized the court of appeals' rejection of petitioners' contention that the district court had erred in affording this interest *any* weight.

Having affirmed the district court's finding that petitioners failed to demonstrate legally significant white racial bloc voting, the Seventh Circuit recognized that it could simply "stop and affirm the judgment." Pet-Ap. 9a. However, given the likelihood of a petition for a writ of certiorari and "the recurring nature" of the issues presented here, the court went on to consider the petitioners' arguments that the district court had erred in analyzing the totality of circumstances. One of the arguments advanced by the petitioners in support of this claim of error was that "the district judge erred in giving any weight to defendants' contention that judges should be elected from districts coterminous with the court's geographic jurisdiction." Pet-Ap. 9a. In resolving this question against the petitioners, the Seventh Circuit expressly recognized that the linkage interest could not automatically outweigh evidence of substantial vote dilution, but was an important factor in analyzing the totality of circumstances:

> Let us return, then, to the question whether the court may give weight to a state's asserted interest in matching the boundaries of a court's jurisdiction to the boundaries of the judges' electoral base. *Houston Lawyers' Ass'n*, 501 U.S. at 427, tells us that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices . . . does not automatically, and in every case, outweigh proof of racial vote dilution." *Judge Gordon did not treat this interest as "automatically" outweighing proof of vote dilution; he said no more than that the interest is weighty.* In asking us to hold that this was error, plaintiffs really want us to say that the only proper weight is zero (or, if not nil, so low that it can never tip the balance). Such a conclusion would put us in conflict with en banc decisions of the fifth and eleventh circuits, which hold that this consideration is powerful, indeed dispositive unless the plaintiffs show gross racial vote dilution. *League of United*

> *Latin American Citizens v. Clements*, 999 F.2d 831, 872 (5th Cir. 1993) (en banc) (LULAC); *SCLC*, 56 F.2d at 1294-95; *Nipper*, 39 F.3d at 1543; accord, *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995).

Pet-Ap. 10a-11a (emphasis added). This conclusion is entirely consistent with *Houston Lawyers' Ass'n*.

Accordingly, the Seventh Circuit did not, as petitioners claim, adopt an "intent" standard in analyzing the totality of circumstances under Section 2 and did not hold, as they suggest, that a system of electing judges ought to be upheld *whenever* a state sincerely believes in its legitimacy. The court said no more than that a "sincerely held belief" in linkage is entitled to some weight in analyzing a state's interest in the challenged electoral system under the totality of circumstances standard and that "the Voting Rights Act does not compel a state to disregard [its] belief that larger jurisdictions promote impartial administration of justice . . . ." Pet-Ap. 13a. In so holding, the Seventh Circuit did no more than affirm the district court's thorough analysis of all factors bearing on the "totality of circumstances," over the petitioners' assertion that there were things that the district judge was required to ignore, such as the circumstances of particular elections, the success of black incumbents, or the nature of the state's interest.

But, petitioners suggest, the Seventh Circuit must have regarded the sincerity of Wisconsin's belief as dispositive, because the state produced "no evidence" as to the strength of its interest. Pet. at 24. They argue that the "linkage" interest could not possibly be given substantial weight because there are some circumstances in which the state must depart from linkage and because the plaintiffs were able to produce some judges who believed the interest to be unimportant. However, as the Seventh Circuit observed, the district court had a great deal of evidence regarding the strength of interest, unbroken history and statewide application of the state's system of electing its judges.

The Seventh Circuit recognized that in adopting its system of matching a judge's jurisdiction with his or her electoral base, Wisconsin sought to balance the need for independence and impartiality with the desire for accountability. At-large elections minimize the role of factions and maximize a judge's accountability, by permitting *all* of the members of a community to play a role in the selection of *each* judge before whom the voters may appear. At-large elections assure that, for the most part, *all* who stand before a judge - whether as party, witness, or victim - know that the judge will some day stand before them. Such has been Wisconsin's system for nearly 150 years, and the state's interest, of sufficient importance to it to be imbedded in its constitution, is not so irrational or tenuous that it could be disregarded in assessing the totality of the circumstances.[12] Abandoning Wisconsin's 150-year tradition of allowing all voters in the jurisdiction to elect judges who will exercise the full authority of the court in those cases over which they preside will not serve the ends of racial justice. The creation of a balkanized system of "black" and "white" judicial branches will contribute nothing to actual, or even perceived, fairness.

Finally, the petitioners' claim, the Seventh Circuit "gave no weight to the countervailing strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election process." Pet. at 25-26. Again, the petitioners incorrectly characterize the analysis of both the Seventh Circuit and the district court. These courts did not conclude that the state's interest in linkage obviated the need to consider evidence of vote dilution, only that Wisconsin's interest would outweigh the insubstantial evidence of dilution offered by the petitioners.

---

[12]None of the alternative schemes offered by petitioners would preserve this interest. Each was designed to permit judges to be elected by a segment of the community to ensure that they need not appeal to the community as a whole. All of these systems would abandon the state's compelling interest in balancing judicial independence and accountability and were properly rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMES E. DOYLE
Attorney General
PETER C. ANDERSON*
Assistant Attorney General
Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
(608) 266-9595

THOMAS L. SHRINER, JR.
RICHARD M. ESENBERG
MICHAEL J. ABRAHAMIAN
Attorneys for Respondent-Intervenors

Foley & Lardner
Firstar Plaza
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

**Counsel of Record*

DECEMBER 1997

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

No. 97-753

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MILWAUKEE BRANCH OF THE NAACP, *et al.*,
Petitioners,

v.

GOVERNOR TOMMY THOMPSON, *et al.*,
Respondents,

and

WISCONSIN ASSOCIATION OF TRIAL JUDGES, *et al.*,
Respondent-Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

RICHARD SAKS
Perry, Lerner, Quindel & Saks, S.C.
823 N. Cass Street
Milwaukee, WI 53202-3908
(414) 272-7400

DENNIS COURTLAND HAYES
WILLIE ABRAMS
N.A.A.C.P. Special Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215-3297
(410) 358-8900

BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
TODD A. COX*
Lawyers' Committee for
Civil Rights Under Law
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8600

BRENDA WRIGHT
c/o National Voting Rights
Institute
401 Commonwealth Avenue
Third Floor
Boston, MA 02215
(617) 867-9074
**Counsel of Record*

Counsel for Petitioners

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

15 pp

RULE 29.6 LISTING

The Milwaukee Branch of the N.A.A.C.P. is a chartered affiliate of the national N.A.A.C.P., which is incorporated in New York, New York, and headquartered in Baltimore, Maryland, as a not-for-profit entity under I.R.C. 501(c)(3).

TABLE OF CONTENTS

Page

I. AT-LARGE ELECTIONS IN MILWAUKEE COUNTY DENY BLACK VOTERS THE EQUAL OPPORTUNITY GUARANTEED BY THE VOTING RIGHTS ACT 1

II. THE SEVENTH CIRCUIT'S RULING THAT THE ANTI-DILUTION PROVISIONS OF SECTION 2 OF THE VOTING RIGHTS ACT CANNOT DEFEAT WISCONSIN'S SINCERELY HELD BELIEF IN AT-LARGE ELECTIONS CONFLICTS WITH THIS COURT'S PRECEDENTS AND WARRANTS GRANTING THE WRIT OF CERTIORARI 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Chisom v. Roemer, 501 U.S. 380 (1990) 5

Houston Lawyers' Association v. Attorney Gen. of Texas, 501 U.S. 419 (1991) 5, 10

Johnson v. DeGrandy, 114 S.Ct. 2647 (1994) 8

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Circuit 1996) *cert. denied*, 117 S.Ct. 1820 (1997) 3

Teague v. Attala County, 92 F.3d 283 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) 3

Thornburg v. Gingles, 478 U.S. 30 (1986) 2,3,5,6, 7,8,10

Statutes and Regulations

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 ..... *passim*

REPLY TO BRIEF IN OPPOSITION

The Brief for Respondents and Respondent-Intervenors in Opposition ("Brief in Opposition") glosses over the central errors through which the Seventh Circuit's ruling strikes at the core of this Court's precedents and the remedial purposes behind Section 2 of the Voting Rights Act. As this Reply Brief demonstrates, Respondents' arguments are legally and factually incorrect, and review by this Court is vital if Section 2 is not to be a dead letter as applied to at-large judicial elections.

I. AT-LARGE ELECTIONS IN MILWAUKEE COUNTY DENY BLACK VOTERS THE EQUAL OPPORTUNITY GUARANTEED BY THE VOTING RIGHTS ACT

Respondents do not dispute, and barely address, that *no* black candidate has *ever* initially won a seat through a contested election for circuit court, while 40 white candidates have attained seats through contested elections over the last twenty-five years. Milwaukee's current at-large judicial election system therefore affords two divergent paths to the bench, one for black candidates and one for white: blacks may attain a seat through an uncontested election only after first being appointed, while white candidates can reach the bench through both elections and appointment. The Seventh Circuit's failure even to address this stark racial divide completely undermines its ruling that white bloc voting is not legally significant.

In their Brief in Opposition, respondents imply that the number of contested elections featuring black candidates is small, stating that black candidates sought judicial office only six times. Respondents simply ignore the two elections in which black candidates were eliminated in the primary, in addition to

their eight defeats in general elections. In fact, the proof of vote dilution in Milwaukee judicial elections is more extensive than that in *Thornburg v. Gingles*, where results from only three election years were examined in some of the districts at issue. *Gingles*, 478 U.S. 30, 81 (1986) (Appendix). Moreover, given the past results of contested elections for black candidates, it is hardly surprising that more have not run. At trial, Louis Butler, a black candidate who ran unsuccessfully in 1989, explained the reluctance of black lawyers to run:

> [M]any people, in my opinion, are reluctant to run because of the great expense in undertaking a race if one hopes to be successful, trying to make the investment, knowing that in Milwaukee County history, three of the seven black Circuit Judges who have made it to the bench have been defeated. That is the way they've left office, knowing that no black candidate has ever been able to successfully challenge an incumbent in a judicial race, knowing that a black candidate has never been able to successfully challenge for an open seat.... [M]any people consider that to be an insurmountable task and aren't willing to take the risk.

July 11, 1996 Tr. at 62.

Respondents attempt to distract from this point by alluding to evidence at trial which, according to respondents, "revealed" that prevailing white candidate enjoyed "considerable political advantages [over their black opponents] unrelated to race." Brief in Opposition at 15. However, respondents evidence of "non-racial" factors, adduced at trial from white

incumbent judges testifying about their own qualifications in elections, was qualitative, non-statistical, and not objectively verifiable. The Seventh Circuit itself *rejected* these alleged "non-racial" factors as a viable explanation for the black candidates' defeat. App. at 8a. Confronted with a clear statistical showing of persistent racially polarized voting, respondents cannot overcome this evidence by focusing on non-racial factors without providing any objectively verifiable analysis demonstrating how non-racial factors could account for the racially divergent results. *See Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) ("The district court's view disregards the established acceptance of regression analysis as a standard method for analyzing racially polarized voting," citing *Thornburg v. Gingles*, 478 U.S. 30, 52-53 n.20 (1986)); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1315-21 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997) (holding district court erred in rejecting statistical showing of racially polarized voting by citing non-racial factors present in elections, when quantitative analysis did not provide objective support for a non-racial explanation).

Respondents' own statistical evidence here confirmed the racial disparities in black-vs.-white judicial elections found by plaintiffs' expert, Def. Ex. 10, 11, so there is no dispute that black and white voters in Milwaukee County, confronted with the same candidates, differed greatly in their reactions to those candidates. As the Fifth Circuit noted in *Teague*,

> Indeed, the district court did not even have to choose among competing opinions based on the statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were

> consistent. And when the district court looked to lay testimony, even the anecdotal evidence was conflicting.

92 F.3d at 291. Here, too, even the anecdotal evidence conflicted with respondents' theory: successful white candidates acknowledged their own weaknesses ("I don't think most people on the street had any idea who I was," July 15, 1996 Tr. at 127; *id* at 140-141). Other witnesses pointing out the objective advantages enjoyed by unsuccessful black candidates. *E.g.*, July 10, 1996 Tr. at 192-94; *id.* at 133-34; July 1, 1996 Tr. at 25-26; Def. Ex. 88, 90, 95. Respondents' theory in no way explains away the racially disparate voting patterns in this case.[1]

---

[1] Respondents attempt to obscure the statistical evidence by presenting half truths about what the evidence actually reveals. First, they focused on the seven primary elections separately, stating the range of white support for the black candidates and touting the fact that the black candidates advanced to the general in five of the primaries. A complete picture of the primary races shows that two of the black candidates in these seven primary elections, Theophilus Crockett in 1973 and Fred St. Clair in 1980, were eliminated outright because of the absence of white support. In the other five, all black candidate advanced to the general election to be defeated (S. Parrish, 1989; C. Parrish, 1979; F. St. Clair, 1979; C. Parrish, 1973, and V. Phillips, 1972). Pl. Ex. 78; *see* App. at 52b-61b. Second, respondents attempt to massage the numbers by arbitrarily isolating the results of elections from 1981 onward, a time frame deliberately chosen to exaggerate the extent of black electoral success. Brief in Opposition at 6, 8 n.6. Because the only two black victories over white opponents occurred in 1981 and 1984, respondents at times describe election results only from 1981, so as to include those victories while excluding several black defeats that occurred only a year or two before 1981. This ploy was specifically disowned by defendants' expert, Dr. Weber, who explained that he used a 1981 cut-off in many of his charts not because of any statistical or political science necessity, but because defense counsel had written their proposed findings of fact using that cut-off. July 12, 1996 Tr. at 135, 212. Dr. Weber acknowledged that it

Respondents also contend that the ability of black candidates to win uncontested elections establishes equal electoral opportunity. Respondents argue that *Gingles* does not bar such a consideration because *Gingles* did not involve judicial elections, in which, according to respondents, it is not a special circumstance to run unopposed.

Respondents do not offer an acceptable rationale as to why *Gingles* should not apply to the analysis of judicial elections. In *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991), this Court held that the Section 2 "results" test applies to claims challenging judicial elections. 501 U.S. at 428. *See also Chisom v. Roemer*, 501 U.S. 380, 398 (1990) ("The results test mandated by the 1982 amendment is applicable to *all* claims arising under § 2") (emphasis added). Therefore, as *Gingles* instructs, the ability of a black candidate to prevail in an uncontested election is not generally informative of whether white bloc voting is legally significant. *Gingles*, 478 U.S. at 51 ("the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- *in the absence of special circumstances, such as the minority candidate running unopposed*, . . . -- usually to defeat the

---

would be equally valid to choose a twelve-year time frame, *id.* at 212-214, in which case the figures would show that *no* black candidate has been successful in *any* contested election, whether running as an incumbent or for an open seat, during the last twelve years. Conversely, if *all* the contested elections with black candidates are included, there have been eight general elections in which black candidates heavily preferred by black voters were defeated by white bloc voting, two additional primary elections in which black candidates were eliminated outright by white bloc voting, and only two elections in which black candidates actually won seats on the court -- both of them when running as incumbents after first being appointed to the seat, and both of them more than 12 years ago. Pl. Ex. 78.

minority's preferred candidate") (emphasis added). The Seventh Circuit contradicted this Court's precedents in ruling otherwise.

Moreover, even if consideration of such evidence were relevant, the record shows that in fact black incumbents have been challenged at a greater rate than white incumbents. Since 1981, only 10% of white incumbents have been challenged compared to 38% of black incumbents, July 9, 1996 Tr. at 114-116; *see* Def. Ex. 133. More importantly, even if a white candidate decides not to run against a black incumbent judge, that decision could be based on any number of factors -- for example, a personal relationship with the particular incumbent, or political enmity between the candidate and another white incumbent whom he decides to challenge instead. Since respondents put on no testimony from any white candidate who had deliberately refrained from running against a black judge, it is purely speculative to draw any conclusions regarding the relative political strength of the black incumbents or the voting behavior of the white electorate based on the fact that particular black incumbents have run unchallenged.

Finally, respondents claim to have missed petitioners' precise point regarding the relevance of proportionality in Section 2 analysis. Although the point may be unclear to respondents, this Court's precedents on the matter are unequivocal. As the petition for writ of certiorari further explains, even if no distinction is made between contested elections (in which black candidates are usually defeated) and uncontested elections (in which, by definition, they are able to prevail), there has been no history of "persistent proportional representation" on the Milwaukee County circuit court or court of appeals that could remotely make out the defense recognized in *Thornburg v. Gingles*, 478 U.S. at 77. *See* Petition for Writ

of Certiorari at 18-19. Indeed, all nine justices in *Gingles* rejected the "proportionality" defense proffered by North Carolina *except* in the one district where black representation on the multimember delegation had been proportional to the black population of the district in *every* election for the previous ten years. 478 U.S. at 77. Respondents do not dispute the gulf between the *maximum* number of black judges that have ever served on the relevant courts at any one time (3 for the circuit court and 0 for the court of appeals) and the number of judges that could be elected from a compact, properly drawn subdistrict having a majority of black voters (up to 9 on the circuit court and one on the court of appeals). Therefore, the election of appointed black judges in uncontested races is irrelevant, because even if those elections are included, respondents cannot demonstrate the type of proportional representation that could make out a defense under *Gingles*.

Because the "proportionality" defense recognized in *Gingles* is unavailable here, whether or not the results of uncontested elections are included, respondents again attempt to evade the *Gingles* standards by creating different tests for proportionality. For example, they imply that the small number of black judges on the bench bears a direct relationship to the pool of lawyers eligible to run for a judgeship. Respondents contend that proportionality should be judged by comparing the percentage of eligible black lawyers among all Milwaukee County lawyers to the percentage of black judges on the bench, and that having three black judges on the circuit court bench is close to the expected result if judges were chosen at random out of the eligible pool of lawyers. Of course, this contention simply ignores the focus of the Voting Rights Act, which is concerned with dilution of the voting strength of minority

voters, not with whether white and black *lawyers* have representation proportional to their numbers.

Indeed, defendants' expert, Dr. Haworth, conceded that if defendants' "random choice" theory were applied to *election* outcomes, the probability that a black candidate would be defeated in 8 of 10 general elections involving one black candidate and one white candidate -- as happened in Milwaukee County -- is only 4% (in other words, a 96% probability that more black candidates would have been elected on the assumption of random choice.) July 12, 1996 Tr. at 21. Dr. Haworth also conceded that the number of eligible black lawyers in Milwaukee County bears no causal relationship to the number of black judges elected to the bench, July 12, 1996 Tr. at 17, and leads to no conclusions at all concerning whether voting is racially polarized, July 12, 1996 Tr. at 16 -- which is, after all, the question that must be answered under *Thornburg v. Gingles.*[2]

By pointing out that black representation on the circuit court and court of appeals is far from proportional to the results that would occur under a district-based plan, petitioners are not arguing that lack of proportionality automatically establishes their claim. Of course, as Justice O'Connor recognized in her concurring opinion in *Johnson v. De Grandy*, 114 S. Ct. 2647, 2664 (1994), lack of proportionality is not dispositive, although it can constitute "powerful evidence of vote dilution." The

---

[2] One of the defendant-intervenors in this case is a circuit court judge from Rusk County, Wisconsin, a county in which only 8 attorneys of any race reside. Pl. Ex. 80; *see* July 12, 1996 Tr. at 29-30. If the small number of eligible attorneys there did not prevent the election of a judge, the numbers in Milwaukee County are also not too small to permit the election of additional minority judges.

plaintiffs did not simply rely on the absence of proportional representation on the bench, but conducted extensive statistical analysis to establish that there were deep, persistent racial divisions in voting patterns in the judicial elections at issue, resulting in the usual defeat of the black-preferred candidates. These racial divisions appeared in numerous elections over a long time period, and occurred under all types of factual circumstances that may have varied from election to election. They clearly demonstrate legally significant white bloc voting.

II. THE SEVENTH CIRCUIT'S RULING THAT THE ANTI-DILUTION PROVISIONS OF SECTION 2 OF THE VOTING RIGHTS ACT CANNOT DEFEAT WISCONSIN'S SINCERELY HELD BELIEF IN AT-LARGE ELECTIONS CONFLICTS WITH THIS COURT'S PRECEDENTS AND WARRANTS GRANTING THE WRIT OF CERTIORARI

Respondents do not successfully rebut the fact that the Seventh Circuit has erected a standard under which a state's sincerely held belief in the legitimacy of its own at-large electoral system is enough to deny relief in a Section 2 claim. The Seventh Circuit's failure even to discuss the alternative remedial schemes that would preserve the state's linkage interest while remedying the vote dilution unequivocally demonstrates that the Seventh Circuit treated state interest as preclusive as a matter of law.

As pointed out in the petition for writ of certiorari, under the rule established by the Seventh Circuit, a plaintiff would be required to challenge Wisconsin's sincere belief in its

own system, as opposed to the dilutive effect the system has on their voting strength, as this Court required in *Gingles*. *Gingles*, 478 U.S. at 63-64. The Seventh Circuit determined what it believed to be Wisconsin's interest in maintaining linkage and the sincerity of the state's belief in the legitimacy of its system. The Seventh Circuit did not weigh Wisconsin's belief or its state interest against the evidence of vote dilution and conclude that, on balance, Wisconsin's state interest outweighed the evidence of vote dilution presented in this case, as respondents claim. Instead, the court shifted the focus of the Section 2 inquiry away from an analysis of the *results* of Wisconsin's at-large system to the *intent* of Wisconsin in adopting and maintaining the system, in contradiction of Congressional design and this Court's precedents. *See* Petition for Writ of Certiorari at 22-23.

While respondents defend their sincerely held belief in the legitimacy of linking a judge's electoral base with his or her jurisdiction through an at-large election system by citing their 150 year unbroken history of maintaining the at-large system and their concern for "balanc[ing] the need for independence and impartiality with the desire for accountability," Brief in Opposition at 20, there is nothing unique or distinguishable about Wisconsin's purported state interest. As petitioners stated in their petition for writ of certiorari, if a judicial election system can escape the strictures of Section 2 on such a generic sincerely held belief, this Court's decision in *Houston Lawyers* would have no meaning, as any state could assert such a belief in defense of their discriminatory at-large electoral scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard Saks
Perry, Lerner, Quindel
& Saks, S.C.
823 N. Cass Street
Milwaukee, WI 53202
(414) 272-7400

Dennis Courtland Hays
N.A.A.C.P. Special
Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 358-8900

Barbara Arnwine
Thomas Henderson
Edward Still
Todd A. Cox*
Lawyers' Committee for
Civil Rights Under Law
1450 G Street, N.W. Suite 400
Washington, D.C. 20005
(202) 662-8600

Brenda Wright
c/o National Voting Rights
Institute
401 Commonwealth Avenue
Boston, MA 02215
(617) 867-9074
*Counsel of Record

Counsel for Petititoners